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In The

Supreme Court of the United States

October Term, 1963

BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, AND GULF COAST SAVINGS & LOAN ASSOCIATION,
Appellants

v.

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL.,
Appellees

On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

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On Appeal From the Supreme Court of Texas

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Texas entered March 20, 1963, reversing the judgment of the Court of Civil Appeals, Third Supreme Judicial District of Texas, and affirming the judgment of the 126th District Court of Travis County, Texas, which decreed that appellants take

nothing in their suit attacking the validity of an order of the Banking Commissioner of Texas and the statute under which he purported to act.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is under the style, Jimmy Phillips, et al. v. Brazosport Savings and Loan Association, et al., is reported, 366 S.W. 2d 929, and shown in the Appendix, at p. ii, et seq.

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, under the style, Brazosport Savings & Loan Association, et al. vs. Jimmy Phillips, et al., is reported, 353 S.W. 2d 78, and shown in the Appendix, at p. xxv et seq.

The opinion of the Supreme Court of Texas on the original appeal of this case, under the style Brazosport Savings & Loan Associaion, et al. v. American Savings & Loan Association, et al., is reported, 161 Tex. 543, 342 S.W. 2d 747, and is in the Appendix at p. xxxvii, et seq.

All emphasis is ours unless otherwise indicated.

GROUNDS FOR JURISDICTION

(1)

Nature of the Proceeding

Appellants, as holders of franchises to conduct sav-

ings and loan businesses, contested the chartering by the Banking Commissioner of Texas of their competitor American Savings & Loan Association, and appealed to the 126th District Court of Travis County from his order granting this charter and franchise. The Texas statute governing creation of savings and loan associations (and hereinafter set forth) made no provision for an appeal by protestants from an adverse decision of the Banking Commissioner and the trial court abated the suit on grounds the court had no jurisdiction to entertain the appeal. This action was affirmed in the Court of Civil Appeals (326 S.W. 2d 567, Justice Hughes dissenting). The Supreme Court granted a writ of error and reversed, holding that appellants as owners of valuable franchises, had an inherent right to appeal, as guaranteed by the Fourteenth Amendment, and were to be afforded a trial under the "substantial evidence" rule. (342 S. W. 2d 747)

It was appellants' position before the Banking Commissioner (as hereinafter set forth in greater detail) that that official must follow the promulgated departmental rules, and receive all evidence, pro and con, at the public hearing, and that failure to do this would result in a denial of appellants' rights to Due Process and Equal Protection, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In the trial court it was appellants' position that the Commissioner had violated his departmental rule, his rulings, and the referenced provisions of the Four-

teenth Amendment, by receiving ex parte and secret evidence (including a secret report, prepared by his investigator), all in violation of appellants' rights, and that his action in chartering American Savings & Loan Association on such basis was void and of no force and effect.

(2)

Chronology of Judgment and Appeal

The date of the judgment of the Supreme Court of Texas appealed from is March 20, 1963 (Appendix, p. ii).

The date of the judgment and order of the Supreme Court of Texas overruling appellants' Motion for Rehearing is May 8, 1963 (Appendix, p. ii).

The Notice of Appeal was filed in the Supreme Court of Texas August 1, 1963. (Transcript, p. 96)

On September 10, 1963 the Supreme Court of Texas entered its order granting appellants an extension of time to and including October 21, 1963, to file this Jurisdictional Statement and docket the case (Appendix, p. xlviii).

(3)

Statutory Provision Conferring Jurisdiction

This appeal is filed under 28 USCA § 1257 (2), "By appeal, where is drawn in question the validity

of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(4)

Cases Sustaining Jurisdiction

The final judgment here appealed from was one reversing the judgment of the Court of Civil Appeals, and affirming the judgment of the trial court, which judgment decreed that appellants (plaintiffs) take nothing by their suit, and that all relief prayed for by them be denied (Transcript, p. 91). The judgment of the Supreme Court is final in every sense within the rule of *Clark, et al. v. City of Kansas City*, 172 US 334, 336, 19 S. Ct. 207, 43 L. ed. 467, at 468, " 'the rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case. ****.' "

The Banking Commissioner of Texas purported to act under authority of Art. 881a-2, Vernon's Anno. Civ. Stat. of Texas (Acts, 1929, 41st Legislature of Texas, 2nd C.S., p. 100, ch. 61, § 2), which reads as follows:

> "When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the mini-

mum capital required has been paid in cash into the treasury of the association upon subscription for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association. If it shall be satisfied concerning the several matters specified, the Banking Commissioner of Texas shall issue under his official seal a certificate reciting in substance the filing in its office of the articles of incorporation; that such articles conform to all requirements of the law, and that they have been approved, whereupon the persons named in the articles of association, their associates and successors, shall become a corporate body for the period for which they were organized, and shall exercise such powers as are herein granted, and such other powers as are necessary to enable such association to carry out the purpose of its organization, not inconsistent with the provisions of this Act, but before such association shall proceed to do business it shall adopt and have approved by the Banking Commissioner of Texas by-laws for the regulation and management of its business, not incon-

sistent with the provisions herein provided. * * * *."

The crux of this appeal is the composite action of the State of Texas: the Banking Commissioner's conduct under this statute, and his flagrant ignoring of the departmental rules governing procedure[1] so that he caused a special investigation to be made, and received a secret and ex parte investigator's report, and relied thereon and on *other* proceedings, to issue his order chartering appellants' competitor, American; *and* the action of the Supreme Court of Texas, in upholding as valid and constitutional, both the Commissioner's order and the statute, as against appellants' claims that this action was in violation of their rights to Due Process and Equal Protection of the Laws. The following cases support the proposition that this Court has jurisdiction of the appeal to remedy this composite action under § 1257(2).

In *Wheeling Steel Corporation v. Glander*, 337 US 562, 570, 69 S. Ct. 1264, 93 L. ed. 1544, on appeal from judgments of the Supreme Court of Ohio affirming ad valorem tax assessments on intangible property, it was held, p. 1550:

> "The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

In *Mooney v. Holohan*, 294 US 103, 112, 55 S. Ct.

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[1]Rules and Regulations for Building and Loan Associations, Chapter 2, appear, page 69, the Transcript of pleadings, and as Plaintiffs' Exhibit 6-B, of the volume of Exhibits, and provide for a public hearing on notice. See Appendix, p. xlix.

340, 79 L. ed. 791, while denying leave to file a writ of habeas corpus on grounds such relief had not been sought first in the state courts, the Court said, p. 794:

> "And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' "

Orders of administrative agencies (such as a university Board of Regents), entered pursuant to a state statute, requiring courses in military science, are "statutes," within the meaning of § 1257 (2): "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state lawmaking power." *Hamilton, et al. v. Regents of the University of California*, 293 US 245, 258, 55 S. Ct. 197, 79 L. ed. 343 at 350. So, too, in *Lathrop v. Donohue*, 367 US 820, 824, 81 S. Ct. 1826, 6 L. ed. 2d, 1191, when the Supreme Court of Wisconsin created the "State Bar of Wisconsin" by order, appeal under § 1257 (2) was held proper, p. 1194:

> "We think that the order is a 'statute' for the purposes of § 1257 (2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of

jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: 'Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court.' Williams v. Bruffy, 96 US 176, 183, 24 L ed 716, 717. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257 (2): '. . . the jurisdictional provision uses the words 'a statute of any State' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction.' King Mfg. Co. v. City Council of Augusta, 277 US 100, 104, 105, 72 L ed 801, 805, 806, 48 S Ct 489. ****."

There can be no doubt that the act of franchising is legislative in character;[2] and the franchises of appellants have been specifically held to be vested property rights. *Brazosport Savings & Loan Ass'n., et al.*

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[2]Texas Constitution, Art. 1, § 17 reads in part: "***** all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

Indeed, "prior to 1913 each savings and loan association in Texas was chartered by a special act of the Legislature. In 1913 the Thirty-third Legislature in its first called session, July 21, to August 19, passed House Bill No. 17: An Act to provide for the incorporation *** of *** building and loan associations; and for the government and control of the same; placing same under the control **** of the Commissioner of Insurance and Banking, ****." See *Cashin, "Savings and Loan in Texas,"* Univ. of Texas, 1956.

v. American Savings & Loan Ass'n., et al., Tex Sup. Ct. 342 S.W. 2d 747 at 750. The order granting the franchise to American was legislative in every proper sense. As in *Atchison, Topeka & Santa Fe Railway Co. v. P.U.C. of California*, 346 US 346, 348, 74 S. Ct. 92, 98 L. ed. 51, on appeal from a judgment of the Supreme Court of California upholding grade crossing orders against due process attacks, the rule is applicable, p. 57:

> "We think the Commission's orders must be treated as an act of the legislature *****. The Commission has construed § 1202 as authorizing these orders. The appellants presented squarely to the Supreme Court of California their contention that **** these orders take their property without due process of law******. In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. ****."

This Court has not heretofore hesitated to take jurisdiction of appeals in order to protect the rights of the holders of valuable franchises from violations of the Fourteenth Amendment resulting in unlawfully created competition. *Frost v. Corporation Commission of Oklahoma*, 278 US 515, 49 S. Ct. 235, 73 L. ed. 483 (discussed, infra).

Moreover, the Court has heretofore recognized building and loan associations to be "financial institutions of major importance to the credit system of the State," and in *Veix v. Sixth Ward Building and Loan Ass'n. of Newark*, 310 US 32, 36, 60 S. Ct. 792, 84

L. ed. 1061, accepted the appeal from an adverse judgment in New Jersey, to review a statute limiting rights to withdraw shares, saying, p. 1064, 1065:

> "The ruling was based squarely on the constitutionality of the Act of 1932. ****. The case is here on appeal ***. As this section gives a review to this Court only of state statutes held valid by the highest court of a state against an attack of repugnancy to the Constitution of the United States, we deem ourself limited to the Act of 1932. **** "

Again, in *Charleston Federal Savings & Loan Ass'n., et al. v. Alderson, State Tax Com'r.*, 324 US 182, 185, 65 S. Ct. 624, 89 L. ed. 857, on appeal from a judgment of the Supreme Court of West Virginia affirming tax assessments against certain federal and state associations, the court took jurisdiction as a petition for writ of certiorari (being a tax case), and said, p. 861:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court (cases cited)."

At every level, both administrative and judicial, appellants have sought protection for, and have squarely presented the question of their rights under the Fourteenth Amendment, and now tender "the underlying constitutional issues in clean-cut and concrete form,

unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts." See *Rescue Army v. Municipal Court of City of Los Angeles*, 331 US 549, 584, 67 S. Ct. 1409, 91 L. ed. 1666, 1686, where appeal was dismissed for failure to so present the issues in a case involving pending prosecution by the state for solicitations without a permit.

This suit directly challenges, not only the validity of the Banking Commissioner's *order*, but the *statute* upon which it is based, and the Court should take jurisdiction, because "The Federal question presented, being one which requires analysis and exposition for its decision, is not frivolous, ****." *Milheim v. Moffat Tunnel Improvement Dist.*, 262 US 710, 716, 43 S. Ct. 694, 67 L. ed. 1194, 1199 (testing validity of a Colorado statute for creation of a tunnel). In addition, this record clearly reflects that "The validity of the statute under the federal Constitution was by the petition appropriately drawn in question and in substance the decision of the state supreme court is in favor of its validity. ****. Its judgment does not depend upon characterization of the statute or mere interpretation of the language employed. ****." *Chesebro v. Los Angeles County Flood Control Dist.*, 306 US 459, 463, 59 S. Ct. 622, 83 L. ed. 921, 925. on appeal from a judgment of the Supreme Court of California, testing validity of a statute authorizing a board to levy assessments in a flood control district, appellant having duly invoked his constitutional rights. Furthermore, this case is well within the rule, stated in *James Stewart & Co. v. Sadrakula*, 309 US

94, 98, 60 S. Ct. 431, 84 L. ed. 596, 600, an appeal from New York testing validity and applicability of a safety statute to federally owned work areas:

> "The language of the Court of Appeals and the record show indubitably that a determinative federal question was decided. The conclusion as to the continued vitality of existing state statutory regulations in the protection of workmen in ceded federal areas makes it substantial. The motions to dismiss or affirm the appeal are denied."

We do not know of any decision of this Court which sanctions the practice of a state administrative agency basing its decisions upon a special, private investigation and the report thereof, where those with valuable interests at stake have no opportunity to know, and no chance to meet and refute the information contained in such secret report. To the contrary, as hereinafter shown, this Court has on various occasions condemned such practice, as have most of the state courts in this country. Such a practice of basing decisions on secret evidence makes a travesty of the Fourteenth Amendment. This question, involving basic concepts of justice, "**** is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration." *Alton Railroad Co. v. Illinois Commerce Commission*, 305 US 548, 550, 59 S. Ct. 340, 83 L. ed. 344 at p. 346, on appeal from the judgment of the Illinois Supreme Court affirming a commission order requiring maintenance of a switch at the railroad's expense, in violation of its rights to due process.

What the decision complained of has done is to uphold as valid a statute authorizing the Banking Commissioner to franchise a competitor on the basis of secret evidence in violation of Due Process, and this, even though the administrative rules require a public hearing. As in *Offield v. New York, N. H. & H. Railroad Co.*, 203 US 372, 377, 27 S. Ct. 72, 51 L. ed. 231, 236, in error to the Supreme Court of Connecticut on the question of the validity of a state statute authorizing a railroad to condemn minority shares of stock, we ask the conclusion that "These contentions raise a Federal question and we cannot say that it is frivolous."

QUESTIONS PRESENTED

I.

The rights of appellants, as quasi-public institutions operating under valuable franchises, to be protected from competition which is created by an administrative procedure which does not afford appellants Due Process and Equal Protection of the Laws, as required by the Fourteenth Amendment.

II.

The unconstitutionality of the State Banking Commissioner's order and action, as violative of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment (when proceeding under promulgated departmental rules providing for a public hearing at which all evidence for an against an application for a franchise shall be received), in basing his decision on

a secret and ex parte investigator's report and evidence which appellants have no opportunity to know and meet.

III.

Whether, in public proceedings afforded by departmental rules at which all evidence is to be received, the statute, Art. 881a-2, Vernon's Anno. Civ. Stat. of Texas, can operate to exempt the Banking Commissioner from compliance with the fundamentals of fair play, the rules, and the requirements of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment of the Constitution of the United States; all, so that he can disregard the public proceedings and base his action on ex parte evidence and a secret report. And the invalidity of the statute when construed to afford such an exemption.

IV.

Inasmuch as the Supreme Court of Texas had declared that the *only* judicial review available to appellants from the adverse decision of the State Banking Commissioner made on ex parte and secret evidence is under the "substantial evidence" rule (as distinguished from a full trial *de novo*), so that the court is not free to make independent findings apart from the finding and decision of the Banking Commissioner, there is involved this question: the unconstitutionality of State action which fails, *at all levels*, both administrative and judicial, to afford appellants, as owners of vested property rights and in a proceeding involving their rights as against their competitors, a fair trial and equal opportunity to know and combat all the evidence; *and a right to*

an independent decision based upon all the evidence so spread upon the record, either by the administrative agency or by a court at the judicial level.

STATEMENT OF THE CASE

(1)

Administrative Proceedings

January 29, 1958, the Banking Commissioner and the Finance Commission of Texas promulgated certain rules of procedure to govern the Commissioner in proceedings involving applications for savings and loan franchises. January 30, 1958, the Commissioner announced to all associations that such rules "govern the establishment of" state chartered associations (Plf. Ex. 6-A, S.F. 49-50). Section 2.1 of the rules requires submission of various specific data, to enable the Commissioner to pass on such matters as responsibility, public convenience and advantage, insurance of accounts, independent quarters, management, adequacy of capital and support by the population. Section 2.2 requires setting of hearing date, publication of notice of hearing, and notice by mail, and public hearing (unless the application is not protested).

Art. 342-103, Vernon's Anno. Civ. Stat. of Texas created a State Finance Commission and a Building and Loan Section, and by Art. 342-114, this agency was authorized to "promulgate general rules and regulations not inconsistent with the Constitution and Statutes of this State, *** which rules shall be applicable alike to all State associations, etc. ***."

These rules appear as Ex. 6-B, of Exhibits. See Appendix, xlix.

These provisions appear in the Appendix, p. xlix et seq. Section 7.1 declares the rules to be "applicable alike to all State associations after their effective date, ***."

In answer to requests for admissions under local practice, the Banking Commissioner admitted that the rules do not provide for or authorize *any* exceptions as to application thereof (S.F. 17, Answers to Requests for Admissions, Tr. p. 79). He also admitted (S.F. 25, Tr. p. 80): "Admits that one of the primary purposes of the Rules and Regulations of January 29, 1958, *is to afford a public hearing at which all evidence for and against an application* for a savings and loan application *will be presented.*"

In relation to Rule 2.1, appellant Brazosport's attorney was unable to obtain any of the information called for by this rule prior to the hearing (S.F. 67-69, 70). The Commissioner first ruled that there would be a second hearing (S.F. 71), but at the conclusion of the public proceedings, ruled that there would be no further hearing, and that Brazosport could file a brief (Plf. Ex. 21, at p. 113), and Brazosport counsel put the question (idem, at p. 113):

> "Q. ***. As I understand it, if the applicant is going to offer anything further, it will be by public hearing?
>
> "Mr. Falkner: Sure; if they have anything else to offer we will get to it." (And see S.F. 83.)

Being firmly convinced that the "evidence" of Amer-

ican offered before the Commissioner was so paltry and incomplete as to not justify a franchise to it, appellant Brazosport, when filing its brief with the Commissioner, specifically stood on the record made, and in such brief (S.F. 519, Plf. Ex. 31, at pp. 4-6), claimed the protection of Rule 2.1 as affording a public hearing; warned that if any ex parte evidence was submitted in behalf of American's application, then appellants' rights to due process and equal protection would not be protected; pointed out that the evidence must be spread upon the record, cited *Ohio Bell Telephone Co. v. Public Utilities Com.*, 301 US 292, 81 L. ed. 1093, and the rules announced at 42 Am. Jur., Public Administrative Law, §§ 128 and 130, and against the possibility that any other evidence might be submitted, stated: "To any such procedure we most strenuously object, and invoke the protection of the Commissioner's own rule and the law applicable in such cases, *for we stand helpless to combat the applicant's case if the Commissioner is to consider any other evidence other than that adduced at the hearing.*" (Plf. Ex. 31, p. 6)

So much for the "public" part of the proceedings, except to add this: on January 23, 1959, the Banking Commissioner issued his order granting the franchise to American, which order recites, *inter alia* that on "the 15th day of December, 1958, came on to be heard an application for a charter *** and due notice having been given as provided by the Rules and Regulations *** and the applicants and all parties in protest to the application having appeared in person or by and through their attorneys, the Banking Commissioner

proceeded to hear and consider the evidence and the statements of counsel in support of said application and the evidence and statements of counsel in protest to said application. And it appearing to the Banking Commissioner, having heard and considered the application, the evidence, and the statements of counsel, both written and oral, that said applications should be (granted) for the following reasons: said application complies with the laws of the State of Texas and the Rules and Regulations for Building and Loan Associations, It Is Therefore Ordered, etc. ****." (Plf. Ex. 20, and see S. F. 75-76)

These solemn recitals of a decision based on the record give no warning of action on secret and ex parte evidence. We turn to the court proceedings.

(2)

Trial Court Proceedings

(a)

Pleadings

Appellants appealed the decision and in their Second Amended Original Petition, filed May 3, 1961 (Tr., pp. 10-11), alleged that they "understood that all evidence adduced in support of the application of Jimmy Phillips, et al. * * * was limited to that submitted at said public hearing, as in justice and fairness should be the case;" and that, there being no further evidence, then applicant had defaulted and failed to fur-

nish the data called for by the rules, and had failed to "meet and satisfy the proof required by law as to the several elements and considerations governing the grant of a charter," and the Commissioner's act in granting the charter was capricious, unreasonable and arbitrary. In the alternative, however, appellants in that petition alleged as follows (Tr. p. 11): that if the Commissioner had been presented other data, evidence, facts, etc. in support of the application, then this was contrary to the Rules and Regulations, and was in violation of plaintiffs' rights as preserved by the Due Process of the Law and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States, plaintiffs having no chance to know, meet and refute any such ex parte evidence.

In preparing for trial, and by May 15, 1961, plaintiffs were able to make these allegations (by Plaintiffs' First Trial Amendment to Their Supplemental Petition ,filed May 15, 1961, Tr. 31, 32):

> "(4) Plaintiffs further say that the Commissioner, in acting and passing upon the application of defendant American ****** did receive ex parte information, evidence, data and other matters, in violation of the rules providing for a public hearing, and of the rights of plaintiffs and contrary to their rights to Due Process of Law as well as their rights under the rules of fair play. Further, that the nature of such evidence was not revealed to plaintiffs either at the hearing or before the Commissioner acted, and they have had no opportunity to examine the same, to contest it, or to otherwise rebut it, and have been denied

their Constitutional rights to Due Process of Law and Equal Protection of the Laws."

(b)

The Evidence

R. C. Findlay, president of appellant Brazosport, testified at the trial, that if the Commissioner had received any other information or facts or so-called evidence regarding this application, either before or after this hearing, it was never made accessible to him; that to his knowledge, the Commissioner never gave his association or any of the other protesting associations any opportunity to rebut or answer any such additional evidence; and that prior to the time the Commissioner entered his order on January 23, 1959, neither the Commissioner, nor anyone in his department, nor did the applicant or anyone for the applicant (American) ever reveal the reception in behalf of the applicant of any so-called evidence or facts or data or information other than the proceedings that took place on December 15, (i.e., at the public hearing). (S. F. 73) This testimony was never refuted.

Commissioner Falkner, called as a witness by appellants, was asked whether he had caused a field investigation to be made; he admitted that he had done this (S.F. 100). Demand was made on him to produce the report thereon, whereupon the Assistant Attorney General representing the Banking Commissioner at the trial objected, claiming this report to be confiden-

tial as in the case of reports made of *existing* associations, as provided by Article 1136a-9 of the Texas Penal Code (S.F. 101-102).

Commissioner Falkner having been called to testify under subpoena duces tecum (S.F. 104), was asked (S.F. 103):

> "Q. Are you willing to let me have the information, Mr. Falkner?
>
> "A. No, sir."

Thereafter, and during a recess, the Commissioner reconsidered, and "concluded that to make the information available is in the public interest" (S.F. 104). This "Report of Investigation" is Plf. Ex. 27, and as to it the Commissioner testified (S.F. 110):

> "Q. ***. Did you place into the record at the hearing, or otherwise inform any of the protestants, including these plaintiffs, as to the contents or nature or subject matter of that report?
>
> "A. No, sir, I never do, as to the contents of them.
>
> "Q. You realized, then, at the time of the hearing and up to the time you ordered, that only you and possibly some other personnel in your Department knew the contents of that report, is that correct?
>
> "A. Yes."

And he testified further (S.F. 111):

> "Q. Now, you, of course, knew, Mr. Falkner,

at the time of the hearing and at the time of your Order of January 23rd, that none of the protestants had had a chance to answer or rebut or meet any of the contents or the evidence or opinions expressed in this report, didn't you?

"A. Certainly I knew it. Those reports are never made public except under the order of the Court."

J. F. Crews, as president of American (S.F. 176), testified that a representative of the Banking Department visited him prior to December 15 (the hearing date), "and met and visited with each of the directors, met with all of them as a group and toured the area and visited with various other people" (S.F. 203). He said that he took the investigator around the area of Lake Jackson (proposed place of business), Brazosport, showed him the residential and commercial sections, took him to Freeport, and to the factories and plants there, and to the Dow Chemical Company industrial complex, and to the city of Angleton (S.F. 204). He testified that the investigator "talked with us primarily about the objectives to be accomplished with the savings and loan association," and that he told the investigator about his "operating policies" (S. F. 205), and said that the investigator stayed there "I think possibly two nights, so that he was there at least part of two days, one or two days, and possibly most of three days" (S.F. 205).

On cross examination by plaintiffs (these appellants), Crews stated (S.F. 225):

"Q. I see. Now, you say Mr. Benson came

down there and spent some time with you folks. Incidentally, did you—were you all billed for his trip by the Banking Department?

"A. Yes, sir, we were.

"Q. And you gave him a considerable amount of information, did you not?

"A. Yes, sir, I did.

"Q. You gave him all of the information you could muster in support of your application; is that substantially correct?

"A. I don't know that I would say that. I had a nice long visit on each of the two days with Mr. Benson.

"Q. And your conversations with him in general, the tenor of them, was whereby you were encouraging him and furnishing him with facts or arguments or what-have-you, in support of your application; is that generally true?

"A. Yes, sir.

"Q. Now,—and did you know that he proposed to return to Austin and give a confidential report to the Commissioner?

"A. I knew only, Mr. McKay, that he was there to investigate our application. As to what form or nature his report would take, I had no idea.

"Q. Now, you made no mention of his report and conversations with him in the public hearing held, did you?

"A. No, sir.

"Q. And you will recall, I believe, without reviewing the entire record, that it is true that Mr. Falkner did not reveal or make any mention of this special investigation that had been conducted, or the results of it?

"A. I don't recall that he did, no sir."

(c)

The Secret Report and Other Ex Parte Evidence

The Court may well gather, as is a fact, that this secret report was *highly* favorable to the applicant, American. It (Plf. Ex. 27) commented upon such matters as population, persons interviewed, description of location, trade area, economic aspects of area, residential conditions and prices, subdivision activities, other stores in the area, future commercial trends, and business activity, industrial plants and payrolls, other associations, and concluded as follows (p. 4 of Plf. Ex. 27):

"Lake Jackson, the most desirable residential area for the rapidly growing industrial city of Freeport, should provide needed funds and loan demand for additional building and loan service.

"During my investigation and interviews I formed the opinion that the area of Lake Jackson, Freeport and Clute will in the very near future again increase in population one hundred percent. The opinion is based upon the industrial program and the expansion of the port facilities now in

progress. I was led to believe also that the character, responsibility and general fitness of the persons named in subject Articles of Incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will honestly and efficiently be conducted. It is my opinion a public convenience and advantage will be promoted.

"Favorable consideration be given subject application is recommended."

Commissioner Falkner testified that he had this investigation made to determine all the factors called for by the statute, supra, and Rule 2.1, supra. (S.F. 107). The Commissioner also testified that he considered this investigative report in determining his decision (S.F. 109). And, he testified on direct examination, over the objection that such would be ex parte to plaintiffs, that he *also had available information of various kinds obtained in connection with applications of other concerns for bank charters and savings and loan charters in the area* (S.F. 147-150).

(3)

Manner of Raising the Federal Questions

(a)

Trial Court

We have alluded to the brief filed with the Commissioner and the pleadings in this case, supra, raising the Federal questions, which are violations of the

rights of appellants under the Fourteenth Amendment.

The Trial Court ruled that appellants could not ask the Commissioner if he did not know that he had a duty to base his decision upon the evidence adduced at the public hearing (S.F. 112).

Appellants made their position clear to the Trial Court, reminding it that they had pleaded deprivation of due process and equal protection, and alleged affirmatively that the Commissioner had acted on a secret report, and that they invoked their rights under the department rules, and stated that "to go out and conduct a public hearing with the one hand, and with the other hand to go out and say, 'Now, you go out and investigate this thing privately for me, and let me have your own report about it, and I am going to consider that.' That makes the requirement of a public hearing, the American sense of fair play at these hearings, a farce." (S.F. 121). And when the Trial Court asked if the statute did not permit such an investigation, appellants reminded the judge that this Court had held in *I.C.C. v. L. & N. R. R. Co.*, 227 US 88, 33 S. Ct. 185, 57 L. ed. 431, that such a construction would nullify the right to a hearing, and quoted at length from the opinion (S.F. 121-122), and mentioned other cases, including those holding that the administrative agency must comply with its rules as to hearings (Cf., *Alexiou v. McGrath*, D.C., Dist. Columbia, 101 F. Supp. 421) (S.F. 123). To which the Trial Court replied: "** there is a distinction in my mind between a statute that specifically gave an adminis-

trative officer authority to do certain things, as distinguished from a statute that gave that administrative officer general authority to promulgate rules of procedure" (S.F. 126), and further commented that the cases cited (by appellants) regarding due process "are cases where the only evidence they had, or substantially the only evidence they had, was evidence gained through procedures and evidence not made public at a hearing." And the Trial Court observed that the Supreme Court of Texas "has repeatedly held that our administrative agencies in the determination of their decisions *can consider all of the information that they have at their disposal*" (S.F. 132); and followed this with the comment that he did not think there would be a deprivation of due process unless "if you have a situation where the only evidence you have was a private hunt, and so forth, ****." At conclusion of the trial, following argument, judgment was entered that appellants, as plaintiffs, take nothing (Tr., p. 91 and Appendix, p. xxxiii).

(b)

Court of Civil Appeals

On appeal to the Court of Civil Appeals, these parties, in their Appellants' Brief, by the First, Second and Fifth Points of Error (Brief, pp. 7-8, 19-25, 30-42), specifically attacked the Commissioner's order and the Trial Court's judgment upholding it as violative of their rights to Due Process and Equal Protection.

By their Eighth Point of Error, they pointed to the error of the Trial Court in so construing Art. 881a as authorizing the Commissioner to base his action on ex parte evidence, such a construction rendering the statute unconstitutional as violative of various constitutional provisions, including the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment (Brief, p. 9, 48-53). These points were fully briefed.

The Court of Civil Appeals' opinion (353 S.W. 2d 58), is reported in the Appendix, pp. xxv, et seq. That Court took note of the foregoing Points of Error (Appendix pp. xxvi, xxvii), observed that if the proceeding were illegal it need not consider the "substantial evidence" question (*idem*, xxviii), observed, among other contentions, that "appellants contend that the charter and certificate of American was granted in an *adversary* proceeding upon the strength of secret and ex parte evidence, and in violation of departmental rules and applicable law, and was arbitrary, capricious, unreasonable and unlawful; ****" (*idem*, xxx) pointed to certain of the admissions made by the Commissioner, to the Supreme Court's prior opinion in this case (Appendix, p. xxxvii) and concluded: "*** we are of the opinion that the action of the Commissioner in holding the hearing under the circumstances and in granting the charter and certificate to American was illegal."

This Court then reversed the judgment of the Trial Court and entered judgment "cancelling the charter and certificate of authority issued to American Sav-

ings and Loan Association, and enjoining the transaction of business thereunder."

(c)

Supreme Court of Texas

When appellees sought a writ of error in the Supreme Court of Texas, these appellants, by their "Respondents' Reply to Application for Writ of Error," filed in the Supreme Court, March 8, 1962, specifically again invoked their constitutional rights in their First and Second Counter Propositions (pp. 5, 6-16, 28-32, 33-48), and fully and in considerable detail, briefed these Federal questions.

Subsequently, by "Respondents' Post Argument Brief," appellants again fully presented, throughout that brief, the matter of their constitutional rights. Again, in "Respondents' Supplemental Reply Brief" (pp. 2-7), appellants sought protection of their rights under the Fourteenth Amendment.

Following the adverse decision of the Supreme Court of Texas these appellants, in their "Respondents' Motion for Rehearing," by Grounds of Error No. 1-5 (briefed, pp. 8-15), attacked the factual conclusions erroneously made by the Court, and by Grounds of Error, 6-11 (briefed, pp. 16-32), fully presented their constitutional claims to the Court. So fully and positively were these Federal questions presented at all levels, administrative and judicial, that we will not

burden this Statement with specific quotations thereof at this time, for we do not conceive that appellees will dispute the fact that appellants have fully raised the issues at every level and at every opportunity.

The Supreme Court of Texas treated these Federal questions in its opinion under the caption "(C) Evidence not Presented at the Hearing" (Appendix, p. xii, et seq.), saying, "Respondents contend that the Commissioner's relying on evidence not introduced at the hearing deprives them of due process of law and that judicial review under the substantial evidence rule does not cure that want of due process." (*idem*, xii)

The Supreme Court opinion refers to only some of the decisions cited by appellants, stating that the cited decisions of the Supreme Court of the United States fell in the category of *dictum*, on the point of the constitutional rights urged (*idem*, xiii), that others were distinguishable because the *statute* required a full hearing with the evidence "spread on the record" (*idem*, xiii, xiv), and stated that "Article 881a does not require a hearing of any kind. The rules, however, provide for a hearing in certain instances, but do not provide any procedure," and then distinguished a Florida decision, where a similar statute was involved, on grounds that that case involved a charge of "moral unfitness." The Court disposed of *Service v. Dulles*, 354 US 363, 77 S. Ct. 1152, 1 L. ed. 2d, 1403, on grounds that the Secretary of State had limited his own authority.

The Court said that "In any event, we think that re-

spondents have not been deprived of their procedural rights in this case. It has repeatedly been held by the Texas decisions that the Commissioner is not confined to the evidence actually brought out at the hearing. but may rely upon information disclosed by the office records (citing cases)." And the Court further stated: "Under these circumstances we find that no due process was denied respondents by the failure of the Commissioner to introduce the investigator's report at the hearing."

These rulings were, palpably, "of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court." Rule 15, Supreme Court Rules.

THE QUESTIONS ARE SUBSTANTIAL

(1)

As Related to the Savings and Loan Industry

This controversy has been of such importance in the State of Texas that the State Legislature, *during this litigation*, has *twice* legislated upon the subject of administrative control of savings and loan associations:

First, all authority has been taken from Banking Commissioner Falkner and entrusted to a Savings and Loan Commissioner. Acts 1961, 57th Leg. of Texas, p. 393, Ch. 198, § 2, amending Art. 342-205 (Banking Code of 1943), Vernon's Anno. Civ. Stat. of Texas.

Second, and shortly after the Supreme Court's opinion, by House vote March 27, 1963 and by Senate vote April 17, 1963, a new Savings and Loan Act was passed, effective January 1, 1964. Acts 1963, 58th Leg. of Texas, Ch. 113, at p. 269, Vernon's Texas Session Law Service. This law, of course, cannot aid appellants, but it is specifically directed to the purpose of preventing any such administrative abuse, in the future, of due process and equal protection as appellants have experienced.[4]

The impact of the Commissioner's conduct on appellants' franchises and businesses is seen in his admissions (S.F. p. 29, and Tr., p. 81-82) that in this area, *in one twelve-month period*, under his authority, three new associations had been put in business (Gulf Coast at Richmond, Ft. Bend County; First Savings at Alvin, Brazoria County; First Savings at Angleton, Bra-

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[4]As to applications for charters: Sec. 2:07 requires public notice and opportunity for any interested party to appear, present evidence and be heard: Sec. 2:08 provides that the Commissioner shall act on the data furnished with the application, the evidence adduced at such hearing and his official records, the statutory prerequisites: Sec. 11.11 requires that any interested party be afforded opportunity to present evidence and be heard, requires the Commissioner on request to keep a formal record of the proceedings and, requires decisions to be supported by findings of fact and conclusions of law. Sec. 11.12, in specifically permitting any interested party to have a judicial review, authorizes a stay, and subdivision (5) (b) directs that "the review of any other act, order, ruling or decision *** shall be tried by the court without a jury in the same manner as civil actions generally and all fact issues material to the validity of the Act, order, etc. *** complained of shall be redetermined in such trial on the preponderance of the competent evidence, but no evidence shall be admissible which was not adduced at the hearing *** or officially noticed in the record of such hearing."

zoria County). In Brazoria County alone, with the chartering of American in January, 1959, three associations were chartered in an approximate twelve-month period, and the Commissioner admitted that "*our records fail to reveal any instance in any county in Texas where as many as three new savings and loan associations were chartered during the same twelve-month period in a county comparable in population to Brazoria County.*" (S.F. 30) He further admitted that when he chartered American he acted with knowledge that Gulf Coast was operating at a loss (S.F. 30), and that First Savings at Alvin was not operating profitably (S.F. 31).

It has long been the rule of this Court that a state process franchising competition for those holding existing franchises must, because of the property rights involved, meet the standards of Due Process and Equal Protection of the Laws. *Frost v. Corporation Commission of Oklahoma*, 278 US 515, 49 S. Ct. 235, 73 L. ed. 483, cited, supra. And while the Texas Legislature has afforded *future* protection from the administrative wrongs like those here complained of, only this Court remains in a position to give appellants that protection of their constitutional rights to which they are entitled.

(2)

Cases Recognizing Similar Questions to be Substantial

There is a veritable legion of such decisions.[3] As here pertinent, this Court's decisions, holding contrary to the Supreme Court of Texas, have considered the questions presented to be substantial and the rights of those injured entitled to protection, whether viewed from the impact (a) of the statute, or (b) of failure to follow the departmental rules.

(a)

The Statute as Interpreted Presents Substantial Questions

Where the proceeding is under a statute authorizing the administrative agency to conduct investigations, this Court has nevertheless held that due process requires the evidence to be spread on the record. *I.C.C. v. L. & N. R. Co.*, 227 US 88, 93, 33 S. Ct. 185, 57 L. ed. 431, 434; *U.S. v. Baltimore & O. S. W. R. Co.*, 226 US 14, 20, 33 S. Ct. 5, 57 L. ed. 104, 107; *Crowell v. Benson*, 285 US 22, 47, 52 S. Ct. 285, 76 L. ed. 598, 610. In the *L. & N. Case*, 57 L. ed. at 434, the claim was that since the statute gave authority to the Commission to obtain information, the Commission could act thereon; the Court refused this contention, saying "But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the

[3] The question is annotated, 99 L. ed. 460, "Administrative decision or finding based on evidence secured outside of hearing and without presence of interested party or counsel—federal cases"; and also, 18 ALR 2d 552 "Administrative decision or finding based on evidence secured outside of hearing, etc. ***."

party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." In the *Baltimore & Ohio Case* this Court said, 57 L. ed. at p. 107:

> "****. We remark that it is stated in the Commissioner's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them."

Again, in *Crowell v. Benson*, supra (76 L. ed. at p. 610, et seq), the Court disapproved the argument that because the deputy commissioner, acting under the Longshoremen and Harbor Workers' Act, could make investigations, the hearing could be a mere formality, saying no such limitation should be read into the statute, and that the law contemplated notice and a public hearing, which "implies that all proceedings **** shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence."

In *Southern Stevedoring Co. v. Voris*, 5th Cir., Texas, 190 F. 2d 275, of the same law, and the contention that it permitted "such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties," thus permitting use of ex parte reports, that Court said: "But this general provision does not, indeed it could not,

dispense with a right so fundamental in Anglo-Saxon law as the right of cross examination. Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law" (citing decisions of this Court).

(b)

Violations of Procedural Rules Which Afford Due Process Present Substantial Questions

Service v. Dulles, 354 US 363, 372, 77 S. Ct. 1152, 1 L. ed. 2d 1403, 1410, and *Vitarelli v. Seaton*, 359 US 535, 540, 79 S. Ct. 969, 3 L. ed. 2d 1012 are to the point. In *Service*, where the Secretary of State contended that he could override a departmental rule which, on affording a hearing on lower administrative levels, made that decision final if favorable to the employee, this Court denied the Secretary's right to nevertheless discharge, saying (1 L. ed. 2d at 1410) that it sustained the contention made: "*** namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." In *Vitarelli*, when the departmental rules requiring specification of charges, hearing on competent evidence, with right of the employee to cross examine were violated, this Court granted relief saying (3 L. ed. 2d at p. 1017): "**** departures from de-

partmental regulations in matters of this kind involve more than mere consideration of procedural irregularities." And, "**** scrupulous observance of departmental procedural safeguards is clearly of particular importance."

Violation—deliberate, we say—of the Banking Commissioner's rules providing for public hearing and reception of all evidence, brings into play the principles of *Yick Wo v. Hopkins*, 118 US 356, 373, 6 S. Ct. 1064, 30 L. ed. 220, 227, i.e., application of a rule, fair on its face "with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured *** by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. ****."

In this field, the case of *Thompson, et al. v. Spear, et al.*, 5th Cir., Texas, 91 F. 2d 430, 434, cer.den. 302 US 762, 82 L. ed. 592 involving the Railroad Commission of Texas, is apropos: "It cannot be said that, because the regulations **** were promulgated by the commission in the exercise of a discretionary power, the commission has the discretion to proceed or refrain from acting under them. Having promulgated a regulation that is valid, fair and just, it may not discriminate between those against whom it is intended to be enforced. Such enforcement would embody the very evils which would render it unlawful." And in *Alexiou v. McGrath, et al.*, D. C. Dist. of Columbia, 101 F. Supp. 421, at 424, the Court stated that once the Attorney General had established "the procedure af-

fording an opportunity for a fair hearing," the court "did not believe his discretion could be exercised arbitrarily in complete disregard of the record," and that consideration of matters outside the record made the hearing a nullity.*

The Supreme Court of Texas, as recently as 1957, has itself recognized the importance of construing a statute which does not on its face call for notice and due process, as implying such requirements, citing *American Power & Light Co. v. Securities and Exchange Com.*, 329 US 90, 67 S. Ct. 133, 91 L. ed. 103, and holding, in *Industrial Accident Board v. O'Dowd*, 157 Tex. 432, 303 S.W. 2d 763 at 766:

> "Obviously if the explicit provisions of a statute direct an administrative board to proceed without notice in contravention of the constitutional due process requirements (as in the Francisco case) there would be no room for a presumption that the Legislature intended that a notice be given. However, on the other hand, we must assume that the Legislature intended to enact a valid law, and in the absence of express language to the contrary, intended that the administrative board should proceed in accordance with constitutional requirements."

The Supreme Court of Texas has, however, specifically construed the instant statute to the contrary. We take it that this Court must accept the Texas Su-

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*The Texas courts have always heretofore held that administrative agencies are bound by their own valid rules. *Gulf Land Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 131 S.W. 2d 73, 79.

preme Court's construction. *Kingsley International Pictures Corp. v. Regents of Univ. of N. Y.*, 360 US 684, 688, 79 S. Ct. 1362, 3 L. ed. 2d 1512, 1516. Such construction being one which permits the Banking Commissioner to make his decision on secret evidence, contrary to the rules of fair play calling for a public hearing, permits him to operate in the teeth of such decisions as *Morgan v. U. S.*, 304 US 1, at p. 18, 58 S. Ct. 773, 82 L. ed. 1129, at 1132, condemning use of "proposed findings" submitted ex parte, after the hearing; and *Greene v. McElroy*, 360 US 474, 496, 79 S. Ct. 1400, 3 L. ed. 2d 1377, at 1391, protecting one from a security clearance revocation based on secret and confidential reports not made available, because violating the "immutable" principle that when government action injures the individual, and its reasonableness depends on fact findings, the evidence must be disclosed. Surely, the substantiality of the Federal questions is strongly threaded into this controversy, where these appellants have been subjected to the administrative farce of a "public" hearing, with the order then based on a secret and confidential report.

(3)

The Limited Judicial Review Emphasizes the Substantiality of the Federal Questions

(a)

Application of Substantial Evidence Rule

Appellants' constitutional rights were at stake;

nevertheless, the Supreme Court of Texas decreed in its first opinion that appellants would only be entitled to prove "the Commissioner's action was illegal or without support *in substantial evidence*" (Appendix, p. xlvii). And again, in its instant decision, the Court said: "We hold that the Commissioner's order granting the charter is reasonably supported by *substantial evidence;* therefore, it is not arbitrary." (Appendix, p. xxiii).

Appellants embrace the proposition that, when constitutional rights are at stake, it is the duty of the courts to make their own independent examination of the record. *Napue v. Illinois*, 360 US 264, 271, 79 S. Ct. 1173, 3 L. ed. 2d 1217, 1222:

> "*****. The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting as it does, on our solemn responsibility for maintaining the Constitution inviolate. (cases cited) ****."

And so holding, this Court further recognized that " 'the duty rests on this court to decide for itself facts or constructions upon which federal constitutional issues rest.' "

We speak now to the anomaly, indeed, to the *hiatus* in the Texas procedure for judicial review of administrative action which, even when constitutional rights are involved, affords no more than a substantial evidence trial. Appellants' constitutional rights were violated at the administrative level, and the adminis-

trative decision and order is issued to their injury. Appellants reach the court house *already saddled* with an administrative order based on secret and ex parte evidence. In Texas, the "substantial evidence" rule fixes a heavy burden.[7] The Texas Supreme Court has

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[7]It is held in Texas that whether an agency "actually heard sufficient evidence to sustain the order is not material." *Cook Drilling Co. v. Gulf Oil Corp.*, 139 Tex. 80, 161 S.W. 2d 1035.

Under the substantial evidence rule "The court will inquire, not whether the agency actually heard sufficient evidence, but whether the facts that existed at the time of the agency's decision or order were such as to justify its action." 1 Texas Jurisprudence 2nd, Administrative Law, etc., § 43, p. 683. And again, "The court will indulge certain presumptions in favor of the validity of the administrative decision or order **** Such presumptions are rebuttable; but they cast on one who contests an agency's action the burden of proof as to its invalidity. Consequently, where the substantial evidence rule applies, the party aggrieved by an administrative decision must assume the burden of satisfying the court that the administrative decision is not reasonably supported by substantial evidence." 1 Texas Jurisprudence 2nd, Administrative Law, etc., § 48, p. 687.

Again, "A court is not confined to the record when reviewing the action of an agency, but may consider evidence properly introduced in court under the general rules of evidence." 1 Texas Jurisprudence 2nd, § 47, p. 686.

For an excellent resume of the situation, see 33 *Texas Law Review*, 717, "Some Aspects of the Texas 'Substantial Evidence' Rule," where the confusion existing as to the rights of litigants is well reviewed. Of the presumption favoring the administrative order it is said, p. 720, 721: "This 'presumption' is apparently irrebuttable, since the court will not inquire what evidence, if any, the agency considered." And of the availability of a judicial inquiry, the author notes the deficiencies: "The difficulty with this rationale is that an agency's error in ruling against a party *does* prejudice his rights, since after the agency has acted he finds it much more difficult to secure a fair determination of these rights; i.e., he must now go beyond convincing reasonable men that his is the better view, and must show that the order is not reasonably supported by substantial evidence." (emphasis the author's)

heretofore noted the remarks of a learned trial judge, trying a case under the "substantial evidence rule," of the burden of those attacking an order under that rule: "It is a peculiar thing that they have a burden which in ordinary parlance and in ordinary understanding of the English language *is an impossible burden*, but the Supreme Court has ruled it to be a *possible* burden by having established the rule itself ****." *T. & N. O. Railroad Co., et al. vs. Railroad Commission of Texas*, Tex. Sup. Ct., 155 Tex. 323, 286 S.W. 2d 112 at 123.

(b)

Limited Judicial Review Fails to Protect Constitutional Rights

Since these administrative proceedings were tainted, *ab initio*, with unfairness, so as to violate appellants' constitutional rights, the Commissioner's order was void, so that any subsequent judicial "review" could not breathe new life into that which was dead. Keyed to this is the proposition that "The essence of justice is largely procedural."[8] The defect can be harmless *only* where it is the court's duty "*to make an independent finding of the facts totally apart from the finding made by the adminstrative tribunal.*" 18 A. L.R. 2d 552, at 585. At no level, administrative or

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[8]Adminstrative Law Treatise (Davis), Vol. 1, § 7:20, p. 506, citing decisions of this Court.

"To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute **." *Speiser v. Randall*, 357 US 513, 520, 78 S. Ct. 1332, 2 L. ed. 2d 1460,

judicial, have appellants been afforded a full hearing, with all the facts publicly spread on the record, and an independent judgment thereon.

In our case the Supreme Court of Texas has not pitched its decision on the proposition that a trial under the substantial evidence rule cured the administrative proceedings; rather, it has condoned what was done at the administrative level, in the teeth, we think, of many rulings of this Court, holding such action unconstitutional. However, against the possible argument that a substantial evidence trial cured the administrative proceedings, we cite *Southern Railway Co. v. Commonwealth of Virginia*, 290 US 190, 198, 54 S. Ct. 148, 78 L. ed. 260, 266; *Ohio Bell Telephone Co. v. P.U.C. of Ohio*, 301 US 292, 300, 304, 57 S. Ct. 724, 81 L. ed. 1093, 1099, 1101; *West Ohio Gas Co. v. P.U.C. of Ohio*, 294 US 63, 68, 70, 71, 55 S. Ct. 316, 79 L. ed. 761, 768, 769; *Crowell v. Benson*, 285 US 22, 46, 52 S. Ct. 285, 76 L. ed. 598, 610[9]

1469, in considering a veterans' tax exemption procedure in California.

[9]These decisions may be compared with a case like *Pacific Live Stock Co. v. Lewis*, 241 US 440, 451, 36 S. Ct. 637, 60 L. ed. 1084, 1097, where the complaint that a board could wrongfully consider ex parte evidence and reports was disposed of by the Court by pointing out that the board acted only as a referee for the trial court, with all evidence laid before the board going before court "where it is to be accorded its proper weight and value. That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable."

Also, *Washington ex. rel. Oregon R. & N. Co. v. Fairchild, et al.*, 224 US 510, 525, 32 S. Ct. 535, 56 L. ed. 863, 868, where, holding that the state statute afforded a "full hearing," yet observed that if the Oregon Company's contention were

In the *Southern Railway Company Case*, cited, involving appeal from the Virginia Supreme Court of an order of the corporation commission requiring the railroad to build a crossing without a hearing, the Court said of the state court's comment that equity would protect the railroad from arbitrary action (78 L. ed. at 266):

> "But by sanctioning the order directing the Railway to proceed it, in effect, approved action taken without a hearing, without evidence, without opportunity to know the basis therefor. ******.
>
> "The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded."

In the *Ohio Bell Telephone Company Case*, when the Commission considered evidence outside the record, this Court condemned such action (81 L. ed. p. 1099): "This is not the fair hearing essential to due process," and added (at p. 1101): "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that." And this Court then fully restated the requirements of due process and fair play.

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true that the statute did not afford it a means of making a defense before the Commission, yet required it to attack the reasonableness of the order on such evidence as it might have been able to procure, then it would have had a valid complaint.

In the *West Ohio Gas Company Case*, where evidence outside the record was considered by the commission, the Court noted that in Ohio there was no provision for review "by a separate or independent suit," and even though this Court then observed that under that Ohio procedure the Supreme Court of Ohio could revise the record both as to law and the facts, nevertheless found this no cure, and held that "But the weakness of the case for the appellee is that the fundamentals of a fair hearing were not conceded to the company.", adding, "The Fourteenth Amendment condemns such methods and defeats them."

Crowell v. Benson stands clearly for the proposition that while a statute can lawfully make administrative action final, assuming proper notice, opportunity to be heard and support by evidence, it should be construed as not precluding "the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted."

(4)

Importance of the Question in the Field of Texas Administrative Law

In the twenty-five years since Rowan & Nichols[10]

[10] *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 US 573, 584, 60 S. Ct. 1021, 84 L. ed. 1368, 1374 (two cases, see also, 311 US 570, 61 S. Ct. 343, 85 L. ed. 358).

this Court's comment then, that the Texas decisions did not make clear whether the Texas courts could exercise an independent judgment as to what is "reasonable," presented a question which has now been foreclosed. The precepts of *Railroad Commission of Texas v. Shell Oil Co.* (1942) Tex. Sup. Ct., 139 Tex. 66, 161 S.W. 2d 1022, 1028 were: "The doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this State." This doctrine was destroyed in 1946 when the Texas Supreme Court, in *Trapp v. Shell Oil Company*, 145 Tex. 323, 198 S.W. 2d 424 at 429, approved this rule: "We think, however, that, generally speaking, the law contemplates that the Commission shall be left free to finally determine controverted issues of fact. *** The court, on appeal from the Commission's order, should not set aside an order *** unless such order is illegal, unreasonable, or arbitrary. Insofar as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence. ****."

The Court will realize the importance of this appeal, in the entire field of administrative procedure in Texas, if the case is left to stand for the proposition that administrative hearings can be conducted in disregard of the time-honored standards of due process and fair play, and the orders thus born of unfairness and denial of due process, nevertheless be protected under the Texas "substantial evidence" rule. The judgment below is in direct conflict with the princi-

ples announced by this Court in many cases, in addition to those herein cited. The administrative process here followed (public hearing but a decision on secret evidence), and then protected by the application of the substantial evidence rule, has operated to entrap appellants, and deny them their rights. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 US 22, 24, 44 S. Ct. 13, 68 L. ed. 143, 145. And if this can be done to appellants, it can be done to others, in similar circumstances, unless this Court decrees otherwise.

(5)

The State Court Judgment as Not Adequately Supported on Non-Federal Grounds

The Court of Civil Appeals made the proper decision: e.g., the Commissioner's action was illegal, *ergo*, there was no need to consider substantial evidence. (Appendix, p. xxviii)

The state grounds mentioned by the Court come within the rule of *Durley v. Mayo*, 351 US 277, 281, 76 S. Ct. 806, 100 L. ed. 1178, 1183: "*** 'But it is likewise well settled that if the independent (state) ground was not a substantial or sufficient one, "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court

will then take jurisdiction." (cases cited).' " And it is clear, in our case, that the Supreme Court of Texas did not decide this case on non-federal grounds, "*** but rather rejected on the merits his federal constitutional claim." *Stroble v. State of California*, 343 US 181, 194, 72 S. Ct. 599, 96 L. ed. 872, 882, on certiorari to review a murder conviction, treating petitioner's contention of denial of due process because of publicity preventing a fair trial, as against the argument that he had failed to make a motion for change of venue. We take it also that appellants are entitled to invoke this Court's judgment, under the doctrine of *Staub v. Baxley*, 355 US 313, 319, 78 S. Ct. 277, 2 L. ed. 2d 302, 309, on appeal from a conviction for soliciting without a permit, on the question whether appellant's pleading had sufficiently raised the question of unconstitutionality:

> " 'It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support *** (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' Ward v. Love County, 253 US 17, 22, 64 L ed 751, 758, 40 S Ct 419, and cases cited."

(A). The statement of the Court that the Commissioner "may rely upon information disclosed by the office records." (Appendix, p. xv):

The decisions of this Court, cited, supra, answer this statement. Based on such decisions as *U.S. v. B.*

& *O. S.W.R.R.*, supra, it is said, in the text of the article on "Official Notice," Gellhorn, 20 Texas Law Review, 131, at 137:

> "At the outset one may put aside, as being clearly beyond the proper sphere of official notice, the fruits of an *ex parte* investigation into the special facts of a pending case. ******. Yet facts which are peculiar to a particular case, that is, the 'litigation facts,' are not appropriately to be noticed. They must be established by evidence which, though it might in some instances be of an unconventional character, must nevertheless be brought into the record for testing and rebuttal by those who may deny its significance."

(B). The statement of the Court that since the statute "expressly authorized *** an independent investigation," etc., "respondents are charged with notice of the likelihood of such an investigation and report." And, the supplemental remarks, that respondents did not demand to see the report, and participated in the hearing without demanding to see the data collected. Also, the statement that there was no showing that there was anything secret about the report. (Appendix, pp. xvi, xvii):

First, the statute simply provides that the Commissioner "shall ascertain from the best sources at his command, and by such investigation as he may deem necessary ***" (Art. 881a-2, Vernon's Anno. Civ. Stat. of Texas). *On the other hand, the Rules of Procedure provided for a public hearing, and, presumably, a fair one.*

In *Ohio Bell Telephone Co. v. P.U.C. of Ohio*, 301 US 292, 306, 57 S. Ct. 724, 81 L. ed. 1093, on appeal from Ohio where the utility commission had acted on ex parte evidence, this Court said, of the claim of waiver, p. 1102:

> "The appellant has not estopped itself from objecting to the use of price trends gathered in its absence. ****.
>
> "****. What is certain in any event is this, that nothing in the course of the trial gave warning of the purpose of the Commission, while rejecting evidence of value in respect of exchanges under bond, to wander afield and fix the composite value of the system without reference to any evidence, upon proofs drawn from the clouds. As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights."

And inasmuch as witness Crews, of American, with whom the investigator spent some two days, did not know that he proposed to give the Commissioner a confidential report, why should these appellants be charged with such notice? (S.F. 225).

There is nothing in the statute which would imply that the Commissioner would or could use a secret report. Rules being promulgated for a public hearing, at which all evidence for and against would be spread on the record, what better source of information could there be than this, *as compared to* the unconstitutional procedures of special investigations and secret reports? Moreover, this investigation was not even con-

tended to have been made under *this* statute, but rather, under a provision of the Penal Code, for it was that penal provision which the Assistant Attorney General specifically relied upon in claiming privilege and secrecy (S.F. 101-102).[11] Indeed, the Commissioner released this information at trial as being in the "public interest," again following this penal provision. Obviously that penal provision has applicability to *going concerns* only, and not proposed associations.

What the State has done is to seek protection under its police powers for violations of the Fourteenth Amendment. This cannot be done. "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." *Panhandle Eastern Pipe Line Co. v. State Highway Com. of Kansas*, 294 US 613, 619, 55 S. Ct. 563, 79 L. ed. 1090, 1095.

That this is the position of appellees cannot be doubted, for their statements bear them out. From "Petitioners' Answer to Respondents' Reply," p. 6, we quote:

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[11] Art. 1136a-9, Vernon's Penal Code of Texas, reads in part: "Art. 1136a-9. Disclosures of Examiners—Penalty. The Banking Commissioner and any examiner, inspector, deputy, assistant or clerk, appointed or acting under the provisions of this Act, failing to keep secret any facts or information regarding *an association obtained in the course of an examination* or by reason of his official position, except when the public duty of such officer required him to report upon or take official action regarding the affairs *of the association so examined*, or who wilfully makes a false official report *** shall be removed from his position or office and shall be fined etc. ****"

"The basic statute here involved, Article 881a-2, obligates the Commissioner to 'ascertain from the best sources at his command and by such investigation as he may deem necessary.' Rules and Regulations which would limit the Commissioner's consideration to testimony offered at a hearing (which is Respondents' basic contention in this litigation, Reply, pp. 12-23, 28-44), or which would require him to make public his sources of information would obviously be inconsistent with Article 881a-2 and Article 1136a-9, V.A.P.C."

Second, as to secrecy of the report: The claim of the Commissioner that he had proceeded under authority of the Penal Code as for an examination; his admission that only he and his office personnel knew the contents of this secret report (S.F. 110); the undisputed testimony of witness Findlay, for appellants, that they had no knowledge of the report (S.F. 73); the Commissioner's attempt to keep the report out of evidence, and his claimed protection of the Penal Code provision; all these undisputed facts give no substance to the Supreme Court's conclusion that there was nothing secret about the report. We most certainly do not claim that the learned Supreme Court of Texas has attempted to avoid a decision of the federal grounds, rather, it has clearly decided these against appellants. However, we do feel that the Court's comment as to no secrecy is no more than *dictum*, and in any event, "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support." *Wolfe v. North Carolina*, 364 US 177, 185,

80 S. Ct. 1482, 4 L. ed. 2d 1650, at 1657, the golf course trespass case.

Third, as to the intimation that appellants had waived their constitutional rights: Appellants were entitled to presume that the Commissioner would deal fairly with them, follow the rules, and make no decision on secret evidence. Many Texas decisions support this proposition: "**** the law presumes, until the contrary is shown, that every public officer will discharge the duties imposed upon him—in other words, that he will comply with the law." 34 Tex. Jur., Public Officers, § 81, p. 462.

Under Texas law there can be no waiver of rights without knowledge or notice, for there must be an intent to waive.[12]

The error of the Supreme Court of Texas here is that it has presumed that appellants waived their constitutional rights, when the law as to presumptions is diametrically opposed to any such proposition. As in *Smith v. United States*, 337 US 137, 150, 69 S. Ct. 1000, 93 L. ed. 1264, 1274, as to whether the accused had waived immunity from self-incrimination by answering certain questions, the Court said: "Waiver of constitutional rights, however, is not lightly to be inferred." And in *Johnson v. Zerbst, Warden, etc.*,

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[12] *White Motor Co. v. Mizell*, Tex. Civ. App., 334 S.W. 2d 828; *Loggins v. Gates*, Tex. Civ. App., 301 S.W. 2d 525, writ ref. n.r.e.; *Garner v. Texas State Board of Pharmacy*, Tex. Civ. App., 304 S.W. 2d 530, writ ref. n.r.e., and cases cited therein.

304 US 458, 464, 58 S. Ct. 1019, 82 L. ed. 1461, 1466:

> "*****. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that 'we do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. ****."

To the same effect is *Emspak v. United States*, 349 US 190, 198, 75 S. Ct. 687, 99 L. ed. 997, 1005.

In short, the implication of waiver here is not unlike the holding by the state court of "voluntary payment" in *Ward v. Love County, Oklahoma*, 253 US 17, 22, 40 S. Ct. 419, 64 L. ed. 751 at 758. When such ground was used by the state court to defeat the Choctaw Indians' suit for refund of taxes, this Court looked at the record, and reached a contrary conclusion, holding "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way." We now ask the same consideration of the Court.

Finally, the local (state) grounds mentioned by the Supreme Court of Texas *after* deciding the federal questions are so inextricably enmeshed *with* the federal questions so as to require this Court to look to the record, under the rule of such cases as *Fiske v. Kansas*,

274 US 380, 385, 47 S. Ct. 655, 71 L. ed. 1108, at 1111 and *Norris v. Alabama*, 294 US 587, 590, 55 S. Ct. 579, 79 L. ed. 1074, 1077. In the *Fiske Case* the Court recognizing that it "will review the finding of facts by a state court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it" and in the *Norris Case*, the Court holding (79 L. ed. 1077) that when a federal right had been set up and denied in the state courts, this Court would inquire into such action, and adding:

> "If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."

(C) The Texas Supreme Court's treatment of the principles of *Service v. Dulles*, cited, supra, at p. 37: The Texas Court disposes of this case and its principles on the proposition that appellants do not direct the Court to any evidence in the record tending to show that "the Commissioner had so construed his authority to grant charters as being limited by a procedural rule requiring that all evidence be introduced at the administrative level" (Appendix, pp. xiv and xv).

First, this is clear error, factually. The Commissioner has admitted, under oath, in response to re-

quests for admissions that "one of the primary purposes" of the rules and regulations "is to afford a *public hearing* at which *all evidence*, for and against an application for a savings and loan application *will be presented*." (This Statement, supra, at p. 17, and Transcript, at p. 80, and S.F. p. 25)[11] Surely, the Commissioner is bound by his own sworn admission as to the applicability of the rules. Indeed, he announced at the hearing that anything further in behalf of the applicant would be by public hearing (S.F. 83, and Plf. Ex. 21, at p. 113). Also, Plf. Ex. 6-A, is his public announcement that "These rules and regulations, in conjunction with the Constitution and laws of Texas, govern the establishment of *** associations ***."

Second, this is error as a matter of law. Even if the Commissioner had not considered himself bound by the rules, this would not operate to exempt him from following them, for any other rule of law would permit administrative officials to escape prohibitions of the Constitution, the laws and the agency's rules simply by contending that they did not consider themselves bound by them. Whether the Commissioner was bound by these rules and the Constitution were ques-

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[11] The Texas Rules of Civil Procedure (as promulgated by the Supreme Court of Texas) provide, by Rule 169, for this method of discovery, to obtain admission from a party "of the truth of any relevant matters of fact," such admissions being "for the purpose of the pending action only." The Court has said that this rule, based on Federal Rule of Civil Procedure 36, 28 USCA, and "The primary purpose of the rule is to simplify trials by eliminating matters *about which there is no real controversy*." *Sanders v. Harder*, Tex. Sup. Ct. 227 S.W. 2d 206, at 208.

tions of law, and not questions to be answered on the basis of what the Commissioner thought. It is a cardinal principle that "Whether an administrative agency applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the agency and govern its action, *are appropriate questions for judicial decision.*" 42 Am. Jur., Public Admin. Law, § 210, p. 625.

The approach of the Supreme Court of Texas gave the Commissioner free rein to discriminate against these appellants and in favor of the appellee, American, by not applying the published rules for public hearing; and in all cases leaving him free to apply the rules, and thus afford *some* protection, or not apply them, and afford *others* no protection. Thus American is given immunity from the rules, i.e., the benefits derived by the Commissioner's failure to comply with them. This smacks of class legislation, prohibited by such cases as *Truax v. Corrigan*, 257 US 312, 333, 66 L. ed. 254, 263. And, further, the rule of that case, in considering an appeal attacking an injunction statute in Arizona, is here applicable (at p. 259):

> "In cases brought to this court from the state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its

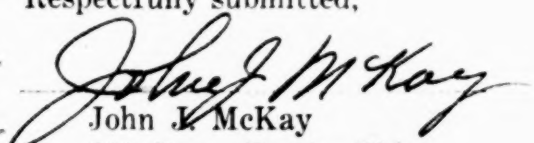
> power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

The Commissioner having unhesitatingly admitted the force and effect of the rules, we take it that this Court will, therefore, consider this fact, and the applicable law, to reach the conclusion that this local (state) ground is without substance.

CONCLUSION

It is submitted that the decision and judgment of the Supreme Court of Texas has effectively denied appellants their rights under the Due Process of Law and Equal Protection of the Laws Clauses of the Fourteenth Amendment, and has constituted a taking of their property contrary to these constitutional provisions. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,



John J. McKay
703 Perry-Brooks Bldg.
Austin, Texas
Counsel for Appellants

Dated,
October 14, 1963.

PROOF OF SERVICE

I, John J. McKay, one of the attorneys for Brazosport Savings and Loan Association, Fort Bend Federal Savings and Loan Association, and Gulf Coast Savings and Loan Association, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 16 day of October, 1963, I served copies of the foregoing Jurisdictional Statement and Appendix thereto on the several parties who are appellees herein, as follows:

On J. M. Falkner, Banking Commissioner of Texas, appellee, by delivery of a copy thereof at the office of said party's counsel of record, Waggoner Carr, Esq., Attorney General of Texas, State Supreme Court Building, Austin, Texas, to a clerk in said counsel's office.

On American Savings and Loan Association, and Jimmy Phillips, et al., directors of said Association, by delivery of a copy thereof at the office of said parties' counsel of record, Martin Harris, Esq., 1020 Brown Building, Austin, Texas, to a clerk in said counsel's office.

John J. McKay
703 Perry-Brooks Bldg.
Austin, Texas
Attorney for Appellants

APPENDIX

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IN THE SUPREME COURT OF TEXAS
AUSTIN

May 8, 1963

No. A-8874.

Jimmy Phillips et al.	)	
vs.	)	From Travis County.
Brazosport Savings &	)	Third Dist.
Loan Association et al.	)	

Motion of respondents for rehearing, filed in above numbered and entitled cause on April 4, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

****

IN THE SUPREME COURT OF TEXAS
AUSTIN

* * * * * * *

March 20, 1963.

No. A-8874.

Jimmy Phillips et al.	)	
vs.	)	From Travis County,
Brazosport Savings &	)	Third Dist.
Loan Association et al.	)	

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals

having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in the judgment of the District Court, it is adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that respondents, Brazosport Savings & Loan Association, Fort Bend Federal Savings & Loan Association (Some times called Fort Bend Savings & Loan Association) and Gulf Coast Savings & Loan Association, and the surety on their appeal bond, National Surety Corporation, pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioners, Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stockley, J. T. Suggs, American Savings & Loan Association—Lake Jackson, Texas, and J. M. Falkner, Banking Commissioner of Texas, have and recover of and from respondents, Brazsoport Savings & Loan Association et al. (above named), and surety, National Surety Corporation, the cost by them expended and incurred in said courts, and that this decision be certified to the District Court of Travis County, Texas, for observance.

IN THE SUPREME COURT OF TEXAS

NO. A-8874

(366 S.W. 2d 929)

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL.	)	
PETITIONERS	)	From Travis County
V.	)	
BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, AND GULF SAVINGS & LOAN ASSOCIATION	)	Third District
RESPONDENTS	)	

This case involves the validity of an order of the Banking Commissioner granting a charter and certificate of authority to American Savings & Loan Association. Respondents—Brazosport Savings & Loan Association, Fort Bend Federal Savings & Loan Association and Gulf Savings & Loan Association—attacked the order in the district court; that court rendered judgment upholding the order of the Commissioner. The Court of Civil Appeals reversed and rendered judgment canceling the charter and certificate of authority of the American Savings & Loan Asso-

ciation. 353 S. W. 2d 78. The officers and directors of American Savings & Loan Association and the Banking Commissioner, J. M. Falkner, are petitioners here.

Respondents contended in the Court of Civil Appeals that the order was invalid on two main grounds: (I) Certain procedural defects rendered the order illegal and (II) the order was not supported by substantial evidence. The Court of Civil Appeals sustained respondents' first contention and held the order illegal, but did not pass on the contention that the order was not supported by substantial evidence. Respondents make both contentions in this court.

I. Procedural Matters

Respondents urge three procedural matters which they say deprive the Commissioner of authority to grant the charter: (A) one of the associates' taking the acknowledgments of the other associates' signatures on the articles of association, (B) failure of Commissioner to require petitioners to file supporting data with the articles of association as provided by Rule 2.1 of the Rules and Regulations for Building and Loan Associations of the Finance Commission of Texas, and (C) the Commissioner's considering an investigator's report which was not introduced at the administrative hearing.

(A) Acknowledgment

Respondents contend that the Commissioner was without jurisdiction to grant the charter because the

application and articles of association were not properly acknowledged as required by Article 881a-29[1] in that one of the members of the Association took the acknowledgment of the 51 other members who signed the articles. The articles of association filed with the Banking Commissioner by the petitioners were signed by 52 persons. One of those signing the articles, Elizabeth B. Bice, a notary public, took the acknowledgments of the 51 others signing the articles. Her own acknowledgment was taken by another notary not a member.

While this court has not passed on the question, it appears from other jurisdictions that when the statute requires that articles of incorporation be acknowledged, then a *valid* acknowledgment is a prerequisite to a statutory right to the granting of the charter. People v. Montecito Water Co., 32 Pac. 236, (California S. Ct.); People ex rel. Erie R. Co. v. Board of Railroad Commissioners et al., 93 N.Y.S. 584.

The general rule in this state and other jurisdictions is that one who is financially and beneficially interested in a transaction is disqualified to take an acknowledgment concerning the transaction. Brown v. Moore, 38 Tex. 646; Rothschild v. Dougher, 85 Tex.

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[1]"Any number of persons, not less than five (5), who are citizens of this state, desiring to incorporate a building and loan association may, by complying with the provisions of this Act and entering into articles of association, become a corporate body. Such articles of association shall be signed by the persons associating and acknowledged before some person authorized by the laws of this state to take acknowledgments to deeds, and shall set forth: * * * [lists information which articles must contain]"

332, 20 S. W. 142, 16 L. R. A. 719; Creosoted Wood Block Paving Company v. McKay, Tex. Civ. App., 211 S. W. 822; Gulf Production Company v. Continental Oil Company, 139 Tex. 183, 164 S. W. 2d 488; 1 Tex. Jur. 2d, pp. 389-390, § 38; see Comment, 14 B. L. Rev. 299 (1962).

However, we think that it was the purpose and intent of the Legislature in requiring that "such articles of association shall be signed by the persons associating and acknowledged before some person authorized by the laws of this state to take acknowledgments to deeds . . ." to assure the Commissioner that the signatures of the incorporators were genuine and to prevent fraud or undue influence. Respondents do not so much as suggest that the signatures were not genuine, or that there was bad faith, or fraud, or undue influence. We hold that the fact that one of the associates happened to be the notary who took the acknowledgments of the other 51 associates does not render invalid the charter granted pursuant thereto.

(B) Failure to File Supporting Data

Rule 2.1 provides as follows:

> "When articles of incorporation of a new association are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed By-Laws of the association and statements, exhibits, maps and other data properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to

(1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage will be promoted by allowing such proposed association to be incorporated and engage in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings and Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, (c) that such proposed association will have qualified, full-time management, and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association."

The Commissioner testified at the trial that it has been his custom not to require the filing of this data if there was to be a hearing. Whether there was to be a hearing depended upon whether or not there were protestants who wished to challenge the granting of the charter. (Rule 2.3 of the Rules and Regulations) Since there was to be a hearing petitioners did not file accompanying data.

Respondents contend that Rule 2.1 requiring the filing of this data is mandatory and jurisdictional and that an order granting a charter when no data has been filed is void.

We overrule this contention. The requirements of this rule are not jurisdictional.

Article 881a-2, from which the Commissioner gets his authority to grant charters, provides as follows:

> "When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the minimum capital required has been paid in cash into the treasury of the association upon subscriptions for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association. If it shall be satisfied concerning the several matters specified, the Banking Commissioner of Texas shall issue under his official seal a certificate reciting in substance the filing in its office of the articles of incorporation; that such articles conform to all requirements of the law, and that they have been approved, whereupon the persons named in the articles of association, their associates and successors, shall become a corporate body * * *.

The statutory mandate is that the Commissioner

must find (1) that the character of the incorporators is satisfactory, (2) that the public convenience and advantage will be served by the granting of the charter and (3) that the population will support a building and loan association. The statute gives the Commissioner the power to "ascertain [these facts] from the best sources at his command, and by such investigation as he may deem necessary." The statute nowhere requires that the Commissioner require the filing of this supporting data at the time of filing the articles of association. This rule is one which the Finance Commission has enacted for the convenience of the Banking Commissioner. The filing of this data merely provides the Banking Commissioner with another source of information. Nothing in the rule imports that its purpose is to acquaint a protestant with the evidence which an applicant is relying on. The Commissioner testified at the trial that his practice has been not to require the filing of the data when there is to be a hearing. He relies on the hearing and other sources of data necessary to a determination as to population, character, and public convenience and advantage. This interpretation of the rule is in harmony with the statute, since the statute gives him discretion to gather data from the best sources at his command.

Respondents contend that they have been deprived of their constitutional rights by the failure of petitioners to file the data, in that they were not able to properly prepare for the hearing, not knowing what evidence was to be offered by the applicants. This is untenable. In the first place, the rule does not provide

that the data be filed before the hearing, but upon presentation to the Commissioner for approval. This could well mean *at the hearing.* In the second place, we can find no unfairness in the Commissioner's not requiring the filing of such data before the hearing was held because the respondents knew exactly who the incorporators were, they knew the town in which the association was to be located, and what the factual issues would be, since they are set out by the statute.

Respondents had ample opportunity after notice to prepare for the hearing. They knew that in order for the Commissioner to grant the charter he would have to be satisfied as to the character of the incorporators, as to the public advantage and convenience for granting the charter, and that the population showed promise of sufficient support for the association. If one or more of the conditions could not be met, respondents had every opportunity of showing the necessary facts to the Commissioner.

Under the circumstances we find no constitutional rights of respondents to be violated by the failure of the Commissioner to require petitioners to file supporting data before the hearing.

The rule is manifestly for the purpose of aiding the Commissioner in performing his duty and not for the purpose of apprising a protestant of evidence to be introduced at a hearing. He may disregard it without infringing upon the rights of the respondents. 42 Am. Jur. 448, Public Administrative Law, § 115.

(C) Evidence not Presented at the Hearing

As their third ground of illegality respondents contend that the Commissioner's relying on certain evidence not introduced at the administrative hearing deprives them of due process of law.

At the hearing J. F. Crews—one of the organizers of American Savings & Loan Association of Lake Jackson, Texas—appeared and testified. Protestants also appeared and gave evidence.

Before the hearing the Commissioner had sent out one Benson, a member of his staff, to investigate conditions in the Lake Jackson area, and Benson filed his report. It is this report which was never introduced at the hearing that respondents complain of most.

Early in the administrative hearing the Commissioner proposed that there be another hearing at a later date, and the parties agreed, but after all parties were heard, he said that he did not see any need for another hearing; thereupon, the hearing came to a close.

In the first Brazosport case we held that respondents have a vested property right in their franchies and that due process of law entitled them to challenge the granting of a new charter and to get judicial review under the substantial evidence rule. Brazosport Savings & Loan Association v. American Savings & Loan Association, 161 Tex. 543, 342 S. W. 2d 747 (1961).

Respondents contend that the Commissioner's rely-

ing on evidence not introduced at the hearing deprives them of due process of law and that judicial review under the substantial evidence rule does not cure that want of due process.

In support of their contention that the 14th Amendment due process clause guarantees them the right to have all the evidence relied on by the Commissioner brought out at the administrative hearing, respondents cite Interstate Commerce Commission v. Louisville and Nashville Ry., 227 U. S. 88, 57 L. Ed. 431; United States v. Baltimore and Ohio Southwestern Ry. Co., 226 U. S. 14, 57 L. Ed. 104; Southern Stevedoring Co. v. Voris, 190 F. 2d 275 (5th Cir. 1951); Trustees of Saratoga Springs v. Saratoga Gas, Electric Light and Power Co., 83 N. E. 693, (N.Y. Court of Appeals); Wichita R. & Light Co. v. Court of Industrial Relations, 214 P. 797 (Kan.); American Employers Insurance Co. v. Commissioner of Insurance, 10 N. E. 2d 76 (Mass.); Pennsylvania R. Co. v. N. J. State Aviation Commission, 65 A. 2d 61 (N.J.); Dembeck v. Bethlehem Shipbuilding Co., 170 A. 158 (Md.); and Coleman v. Watts, 81 So. 2d 650 (Fla.).

We have examined these cases and have concluded that except for Coleman v. Watts, supra, they fall into two categories: (1) cases which state the proposition favorable to respondents by way of dictum; the two United States Supreme Court cases represent this category; and (2) cases which are distinguishable from the case at bar because the applicable state or federal statute either expressly or by implication required a full hearing with all the evidence considered by the administrative official "spread on the record"

of the administrative hearing. In some of these cases the statute expressly required a full judicial type hearing which by definition includes the right to have all evidence relied on introduced at that hearing. In other cases in the second category, the statute expressly limited judicial review to the record made at the hearing.

As we have pointed out, Article 881a does not require a hearing of any kind. The rules, however, provide for a hearing in certain instances, but do not provide any procedure. This brings us to a consideration of Coleman v. Watts, supra, which involved a Florida statute somewhat similar to Article 881a in that there were no procedural requirements prescribed by the Legislature. In that case the State Board of Bar Examiners operating under statutory authority denied an applicant a license on the ground of moral unfitness without disclosing at a hearing the specific charges against him or the evidence of his unfitness relied on by the examiners. The Supreme Court of Florida held this to be a violation of procedural due process and reversed the Board order denying the license.

We think the fact that the applicant in that case was accused of moral unfitness sufficiently distinguishes that case from the case at bar.

Aside from the constitutional requirements, respondents also cite Service v. Dulles, 354 U. S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152. This was a case in which the Secretary of State discharged a foreign service officer on the recommendation of the Loyalty Re-

view Board without himself reading the evidence and without making an independent determination. The Secretary of State discharged this officer under the authority of the "McCarren Rider" to the Appropriations Act for 1947. 65 Stat. 581. The "McCarren Rider" gives the Secretary of State authority to discharge employees "in his absolute discretion . . . whenever he shall deem such termination necessary or advisable in the interests of the United States." The McCarren Rider gave the Secretary additional authority to discharge free of the procedural regulations imposed on him under the Loyalty Security Program. But the Supreme Court held that, while he need not have done so, the Secretary of State had limited his own authority by those rules and regulations and that he must abide by them. The rules required him to examine the evidence of the employees' disloyalty and to make an independent determination. Failure to do this rendered the discharge void.

Respondents seek to invoke this principle in the instant case, but they do not direct us to any evidence in the record tending to show that the Commissioner had so construed his authority to grant charters as being limited by a procedural rule requiring that all evidence be introduced at the administrative hearing.

In any event, we think that respondents have not been deprived of their procedural rights in this case. It has repeatedly been held by the Texas decisions that the Commissioner is not confined to the evidence actually brought out at the hearing, but may rely upon information disclosed by the office records. Alamo

Express v. Union City Transfer, 158 Tex. 234, 309 S. W. 2d 815 (1958); Railroad Commission v. McDonald, 90 S. W. 2d 581 (Tex. Civ. App. 1936), no writ history; North East Texas Motor Lines, Inc. v. Texas & Pacific Motor Transport Co., 159 S. W. 2d 926 (Tex. Civ. App. 1941) no writ history; Texas Industrial Traffic League v. Railroad Commission of Texas, 255 S. W. 2d 903, (Tex. Civ. App. 1953), ref'd n.r.e.

Since the statute expressly authorizes the Commissioner to make an independent investigation and to rely on the results thereof in making his determination, respondents are charged with notice of the likelihood of such an investigation and report. Moreover, before the hearing, investigator Benson interviewed officers of two of the protesting building and loan associations, thus putting them on actual notice that the Commissioner was exercising his authority to make an independent investigation. Yet the respondents participated in the administrative hearing before the Commissioner without once demanding to see the data collected by the investigator. Toward the end of the hearing the Commissioner stated that he did not see any need for another hearing. In reply to this respondents' attorney said, ". . . As I understand it, if the applicant is going to offer anything further, it will be by public hearing." And the Commissioner answered, "Sure, if they have anything else to offer, we will get to it."

Thus respondents demanded that the Commissioner continue the hearings in the event that petitioners offered more evidence, but they never asked to have the

investigator's report brought out at a public hearing. The Commissioner has never refused to produce the report at a public hearing.

There is no showing that there was anything secret about this report or that it was not available to the parties at all times for the mere asking. Under these circumstances we find that no due process was denied respondents by the failure of the Commissioner to introduce the investigator's report at the hearing.

II. Was there Substantial Evidence?

While respondents mainly rely on the argument that the Commissioner had no right to rely on incompetent evidence (evidence not presented at the administrative hearing), they do have counter points of error by means of which they argue that the holding of the Court of Civil Appeals is correct because there was not substantial evidence on which the Commissioner could base his decision; thus, it becomes our duty to review the evidence available to the Commissioner at the time he granted the order to determine whether or not that order may stand.

Review under the substantial evidence rule entails the following principles: The order of the Commissioner is presumed to be valid. The courts may not substitute their discretion for that delegated to the Commissioner by the Legislature; thus, the only question before the trial court is whether the Commissioner's decision was arbitrary and made without regard

to facts. Railroad Commission v. Shell Oil Co., 139 Tex. 66, 161 S. W. 2d 1022 (1942); Alamo Express v. Union City Transfer, 158 Tex. 234, 309 S. W. 2d 815 (1958); Thomas v. Stanolind Oil & Gas Co., 145 Tex. 270, 198 S. W. 2d 420 (1946). The test of whether an order is supported by substantial evidence is stated in Railroad Commission v. Shell Oil Co., supra, at 1029:

> ". . . where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order if the action of the agency in reaching such conclusion is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, nor does it mean that the court is bound to select the testimony of one side, with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole and it is for the court to determine what constitutes substantial evidence. The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."[2]

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[2]This statement is quoted in Trapp v. Shell Oil Co., 145 Tex. 323, 198 S. W. 2d 424, and in Alamo Express v. Union City Transfer, supra. For another statement of the rule see Shupee v. Railroad Commission, 123 Tex. 521, 73 S. W. 2d 505.

Under the presumption of validity, the evidence which the court may consider includes proof made at the trial of facts in existence at the time the Commissioner entered his order, whether the Commissioner is shown to have been aware of those facts or not. Cook Drilling Co. v. Gulf Oil Corporation, 139 Tex. 80, 161 S. W. 2d 1035 (1942); Railroad Commission v. Shell Oil Co., supra; Alamo Express v. Union Transfer, supra.

Summary of the Evidence

The character, responsibility and general fitness of persons named in the articles of association have not been questioned.

As to public convenience and advantage, the Finance Commission has in Rule 2.1 announced four criteria: (a) Insurance of accounts—The record includes a copy of a letter from Federal Home Loan Bank of Little Rock acknowledging receipt by it of an application for insurance prior to the granting of the charter. This letter refers to accompanying forms for application of insurance to be returned after the charter is granted. Respondents do not show us anything in the record tending to rebut the application for insurance or tending to show that it will not be granted; thus, they have not met the burden of proving that there was no substantial evidence to support that finding.

(b) Independent ground floor quarters—Crews testified at the trial that the association had leased 900 square feet of independent ground floor office space in

downtown Lake Jackson and had done so before the Commissioner granted the charter. This information was available to the Commissioner at the time he granted the charter. Again, respondents fail to direct us to evidence in the statement of facts tending to refute that this was a fact at the time the Commissioner entered his order. They have failed to meet their burden of proof in this respect.

(c) Full-time management—Crews testified at the trial that B. J. Roberts had been selected to be manager and that the Commissioner had been so informed before he granted the charter. Crews also testified as to Roberts' business background and qualifications. Respondents do not rebut this testimony; they merely point to the Commissioner's statement that while he regarded qualified management as the most important single factor, he did not investigate Roberts personally, leaving that to his investigator Benson.

(d) Adequacy of initial capital—Crews testified that paid in capital was $140,000. This data was made available to the Commissioner as early as the date of the hearing. Respondents do not have evidence in the record rebutting this.

On the question of whether or not the population of the area to be served by the proposed building and loan association promised adequate support, Crews testified from a report prepared by the association; this report gives a rather impressive mass of data concerning economic conditions in and around Lake Jackson. Crews testified at the trial that the report contained facts

which were in existence at the time the Commissioner granted the charter. Some examples of that data will be sufficient for our purposes:

Brazoria County was growing faster than neighboring counties due to increased industrial activity. Lake Jackson's population grew from almost 3,000 in 1950 to 10,000 in 1957. Residential building permits were increasing rapidly. Dow Chemical, one of the two main industries in the area, employed most of Lake Jackson residents. Property valuations in Lake Jackson increased 12 times during the period 1944-1958. Savings during the period 1954-1958 increased some sixfold.

Benson's field report, made for the Commissioner, was introduced at the trial and includes the following data: Estimated population of the area to be served by the proposed building and loan association was 32,000. Lake Jackson is a "[m]odern city, built and incorporated in recent years. Ninety per cent of [its] inhabitants [are] employed by Dow Chemical, Freeport, nine miles distant." The population trend is "upward." Ninety-eight per cent of the homes are occupied by owners. Ninety-eight per cent of the dwellings were single family. The average selling price for single family dwellings was $15,000. Forty per cent of the residentially zoned property was undeveloped or vacant. Dow Chemical Company was continually expanding. Freeport harbor was being expanded. Two industries employ 5,000 workers and their payrolls are $28,000,000. Proposed industrial expansion of the area is likely to cause rapid popula-

tion increase in the area. There are four competing building and loan associations in the area, none in Lake Jackson itself.

Benson's report concluded with a statement that he believed that the character, responsibility, and general fitness of the persons named in the articles of association would "command confidence and warrant a belief that the building and loan association would be honestly and efficiently operated."

Respondents do not seriously attempt to rebut this data; their argument has consistently been that there were already enough building and loan associations in the area and that to charter one more would spread the business too thin, cause those building and loan associations in existence to operate at a loss and thereby detract from the public convenience and advantage.

For example, they testify that Brazosport Savings & Loan Association is located in Freeport, just eight miles from Lake Jackson, and that there are good, well travelled roads connecting these cities. There is similar testimony as to a number of other building and loan associations in the area. They also testified that there was active competition for the Lake Jackson business.

Respondents rely heavily on testimony of officers from other building and loan associations tending to show that business generally has been slow and that applications for loans have likewise been off. Respondents have testimony that two newly formed

building and loan associations are operating at a loss. The Commissioner testified that new associations were not expected to make money in the early years of their existence.

The decision as to the advisability of permitting another building and loan association to operate in the area calls for the exercise of discretion on the part of the Commissioner. The mere fact that there are a number of associations serving Lake Jackson does not preclude the Commissioner from finding that the public convenience and advantage would be served by having a building and loan association located in the town of Lake Jackson.

We hold that the Commissioner's order granting the charter is reasonably supported by substantial evidence; therefore, it is not arbitrary.

The judgment of the Court of Civil Appeals is accordingly reversed and the judgment of the trial court affirmed.

Robert W. Hamilton
Associate Justice

RWH/p
Opinion delivered:
Mar 20 1963

JUDGMENT RENDERED JANUARY 3, 1962

BRAZOSPORT SAVINGS AND LOAN ASSOCIATION

VS. NO. 10,943

JIMMY PHILLIPS ET AL.

OPINION BY ARCHER, CHIEF JUSTICE

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THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was error in the judgment, IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby reversed and judgment rendered cancelling the charter and certificate of authority issued to American Savings & Loan Association and enjoining the transaction of business thereunder. It is FURTHER ordered that the appellees Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stokley and J. T. Suggs, and American Savings & Loan Association—Lake Jackson, Texas, and J. M. Falkner, Banking Commissioner of the State of Texas pay all costs in this behalf expended, both in this Court and the Court below and that this decision be certified below for observance.

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IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,

AT AUSTIN

NO. 10,943

(353 S.W. 2d 58)

BRAZOSPORT SAVINGS & LOAN ASSOCIATION ET AL,

APPELLANTS

vs.

JIMMY PHILLIPS ET AL, APPELLEES

FROM DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT, NO. 113,075, HONORABLE JACK ROBERTS, JUDGE.

This is an appeal from a judgment of the District Court of Travis County, Texas, denying appellants any relief on their petition for a judgment (1) declaring the action of the Banking Commissioner in granting a charter and certificate of authority to American Savings and Loan Association to be void, (2) permanently enjoining the individual defendants from doing business under such authority and the Commissioner from permitting them to engage in a savings and loan business, and (3) in the alternative, for a declaratory judgment declaring the action of the Commissioner to be void.

The subject matter of this litigation has been before

this Court at a prior date, in Brazosport Savings and Loan Association v. Phillips, 326 S.W. 2d 567. The Supreme Court granted a writ of error and reversed the judgment of this Court, and its opinion is found in Tex. , 342 S.W. 2d 747. The Court there held:

> "In accordance with prior decisions of this and other courts with which we agree, we believe that petitioners possess a valuable and vested property right in their franchises. Petitioners' allegations of fact that this right has been infringed upon by the action of the Commissioner must be taken as true in view of the procedural status of the case. Therefore, we hold that petitioners are entitled to an opportunity to prove their allegations that the Commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved. Such an opportunity is afforded to petitioners by the due process clauses of the Constitution of this state and of the United States. Vernon's Ann. St. Const. Art. I, Sec. 19, U.S.C.A. Const. Amend. 14."

The case was tried and the judgment hereinabove was rendered and the case is before this Court on appeal.

The appeal is founded on 13 points assigned as error in the trial of the case and are that the Court erred in upholding the validity of the charter and certificate of American, because the Commissioner acted in violation of the rules and applicable law by relying on ex parte evidence and such conduct was arbitrary, capricious, unreasonable and unlawful; that the action of the Commissioner was based on secret and ex parte

evidence; that the application and articles of American filed with the Commissioner were not properly verified and were contrary to the provisions of Art. 881a-29, V.A.C.S. Sec. 2.1 of the Rules and the Commissioner's jurisdiction was never properly invoked; that the application on behalf of American failed to comply with the rules of the Building and Loan Section of the Finance Commission of Texas and the Banking Commissioner because the same were not accompanied by the required statements, exhibits, maps and other data, properly verified in sufficient detail to enable the Commissioner to pass on the proposed charter; that the manner in which the Commissioner accepted and filed the application and substitute application of American and granted the same constituted arbitrary action and a denial to appellants of due process; because the Commissioner did not give proper consideration to the competitive and damaging effect upon existing associations; that the granting of the application was in violation of Section 2.4 of the departmental rules requiring the Commissioner to file a written memorandum of his reasons for granting the charter; in construing Article 881a and the rules as authorizing the Commissioner to grant the charter because appellants were not afforded due process; that the Commissioner acted upon insufficient evidence or competent evidence in granting the charter; in upholding the action of the Commissioner in considering evidence heard in other proceedings and in considering evidence by witness Crews in testifying from D. Ex. 2 captioned "A Survey Report Prepared for Federal Home Loan Bank, etc." because such constituted hearsay testimony; and finally, in admitting in evidence

P. Ex. 27, a Field Investigation Report, such being hearsay.

The first five points are grouped together and briefed as such.

The prime question or questions to be determined under the Supreme Court's judgment is whether the Commissioner's action in granting the charter was illegal or without support in substantial evidence. If the action was illegal we need go no further, and we shall determine this question first. The burden was on appellants to prove that the Commissioner's action was illegal or that the Commissioner did not acquire jurisdiction to hear the application.

Rules and Regulations for Building and Loan Associations had been promulgated by the Building and Loan Section of the Finance Commission of Texas and the Banking Commissioner of Texas and were in effect, one of which reads as follows:

"Chapter 2. **New Charter Applications**

"2.1 When articles of incorporation of a new association are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed By-Laws of the association and statements, exhibits, maps and other data, properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to (1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage

will be promoted by allowing such proposed association to be incorporated and engage in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings and Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, (c) that such proposed association will have qualified, ful--time management, and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association."

On September 26, 1958 the individual defendants filed with the Commissioner certain Articles of Association and Application for Charter for American Savings and Loan Association—Lake Jackson, Texas, which was received by the Commissioner and held by him without fixing a hearing thereon within ten days, as required by Rule 2.1. Thereafter the said defendants superseded and amended their Articles and Application by instruments dated October 27, 1958, and filed these instruments with the Commissioner on or about October 31, 1958.

This amended application was not accompanied with supporting data as provided by the rule, and it is from approval of this application that the appeal is taken.

The hearing was had on December 15, 1958 and was attended by appellants as adversaries and protested.

As is presented in appellants' first point of error, appellants contend that the charter and certificate of American was granted in an adversary proceeding upon the strength of secret and ex parte evidence, in violation of departmental rules and applicable law, and was arbitrary, capricious, unreasonable and unlawful; by further assignment appellants say that the said application and articles of American filed were not properly verified and the jurisdiction of the Commissioner was never properly invoked and further that the application and articles were not accompanied by the required statements, exhibits, maps and other data properly verified, sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter.

The amended application for a charter was not accompanied with nor was there filed with it such supporting data, verified or otherwise as required by the rule, consequently protestants were deprived of reasonable opportunity to know of the claims, allegations and proposed proof of applicants until the public hearing began, and were denied a fair and reasonable opportunity to prepare to meet the claims of applicants.

The application and articles filed with the Commissioner contained a jurat affixed thereto, executed by Elizabeth B. Bice, a notary public for Brazoria County, Texas, who is shown to be one of the incorporators of the association and a stockholder and as such is interested in the charter and the certificate sought.

In response to request for admissions the Commissioner admitted:

"(14) Admits that at the time the application and articles dated October 27, 1958, were presented to me on October 31, 1958, same were not accompanied by any statements, exhibits, maps and other data, properly verified.

"(15) Admits that at the time the application and articles dated October 27, 1958, were presented to me on October 31, 1958, same were not accompanied by any data sufficiently detailed and comprehensive to enable me, as Commissioner, to pass upon the proposed charter as to the matters set forth in item (1), Item (2), (2) (a), (2) (b), (2) (c) and (2) (d), and Item (3) of Section 2.1 of the Rules and Regulations appearing as Exhibit A attached to the request for Admissions, except that data and information pertaining to the matters set forth in Section 2.1 of the Rules and Regulations are included in the Application and Articles of Association."

It was admitted by the Commissioner that:

"(16) Admits that one of the primary purposes of the Rules and Regulations of January 29, 1958, is to afford a public hearing at which all evidence for and against an application for a savings and loan application will be presented.

"(22) Admits that prior to my action in granting approval of application and articles for American Savings & Loan Association the Proponents thereof did not at any time submit to me any verified (by acknowledgment or affidavit) statements, exhibits, maps and other data pertaining to Elements (1), (2) and (3) prescribed in Rule 2.1."

In the opinion of the Supreme Court, Tex. , 342 S.W. 2d 747, the Court held:

> "The rules and regulations for building and loan associations, as set forth in Article 881a-2, V.A.C.S., require that applications and articles be accompanied by certain data, properly verified and sufficiently detailed and comprehensive, to enable the Commissioner to pass upon a proposed charter. By the same article the Commissioner is charged with the duty of determining the character and fitness of the incorporators, and ascertaining 'whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association.'"

Basing our opinion on the record as a whole and the judgment of the Supreme Court, we are of the opinion that the action of the Commissioner in holding the hearing under the circumstances and in granting the charter and certificate to American was illegal.

The judgment of the Trial Court is reversed and judgment is here rendered cancelling the charter and certificate of authority issued to American Savings and Loan Association, and enjoining the transaction of business thereunder.

Roy C. Archer, Chief Justice

Reversed and Rendered.
Filed: January 3, 1962.
Richards, A. J. not sitting.

NO. 113,057

BRAZOSPORT SAVINGS AND LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS AND LOAN ASSOCIATION, GULF COAST SAVINGS AND LOAN ASSOCIATION, ET AL, Plaintiffs	)	IN THE 126TH DISTRICT COURT
V.	)	
JIMMY PHILLIPS, J. T. SUGGS, J. P. BRYAN, JAMES F. CREWS, ET AL, Defendants	)	TRAVIS COUNTY, TEXAS

JUDGMENT OF THE COURT

ON THE 16th day of May, 1961, in the above entitled and numbered cause, wherein Brazosport Savings and Loan Association, Fort Bend Savings and Loan Association, and Gulf Coast Savings and Loan Association are plaintiffs and Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stokley and J. T. Suggs, and American Savings and Loan Association—Lake Jackson, Texas, and J. M. Falkner, the Banking Commissioner of the State of Texas, are defendants, came the parties in person and by their attorneys; and

The defendants Jimmy Phillips, George G. Badge, J. P. Bryan, James F. Crews, James G. Dickson, Jerry

T. Fauvion, Jack E. Reid, B. J. Roberts, H. D. Sherbrook, Belvin Stewart, E. C. Stokley, J. T. Suggs and the American Savings and Loan Association—Lake Jackson, Texas, having, pursuant to Rule 174(b), Texas Rules of Civil Procedure, brought to the attention of this Court their Motion to Sever the separate claim alleged by the plaintiffs in subparagraph (3) (a), (b), (c), (d), (e), (f), (g), (h), and (i) of paragraph XII of Plaintiffs' Second Amended Original Petition and it appearing to the Court that said cause of action as therein alleged should be separately tried because such separate trial of the claims therein alleged will expedite the determination of the issues in the original cause of action which was by the Supreme Court remanded to this Court for trial on the merits and will avoid delay, inconvenience and expense to these defendants: and it further appearing that the allegations in said paragraphs constitute an attempt to allege a new, separate and distinct cause of action exclusively against defendant J. M. Falkner, Banking Commissioner of Texas, wholly separate and apart from the original cause of action alleged in Plaintiffs' First Amended Original Petition against both the Banking Commissioner and said other defendants;

It is, accordingly, ORDERED, ADJUDGED and DECREED that the cause of action alleged by plaintiffs in paragraph XII of Plaintiff's Second Amended Original Petition be severed from this cause of action and such severance suit shall proceed under the style and number of a new cause of action; and

Thereupon, came the parties in person and by their attorneys and submitted the matters in controversy

to the Court for trial on the merits without intervention of a jury, and the pleadings, the evidence, and the argument of counsel having been heard and fully understood, and the Court having determined all matters of fact and law, it is the opinion of the Court that the law and facts are with the defendants;

It is, accordingly, ORDERED, ADJUDGED and DECREED that the plaintiffs take nothing by their suit; that all relief prayed for by plaintiffs is hereby denied; that all court costs be assessed against plaintiffs, and defendants go hence without day; to all of which the plaintiffs in open Court duly excepted and gave notice of appeal to The Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

ENTERED this the 12th day of June, 1961.

Jack Roberts
JUDGE of the 126th District Court

APPROVED AS TO FORM:

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ATTORNEYS FOR BRAZOSPORT SAVINGS AND LOAN ASSOCIATION

IN THE SUPREME COURT OF TEXAS

NO. A-7521

(342 S.W. 2d 747)

BRAZOSPORT SAVINGS AND LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS AND LOAN ASSOCIATION AND GULF COAST SAVINGS AND LOAN ASSOCIATION	)	From Travis County
PETITIONERS	)	
V.	)	
AMERICAN SAVINGS AND LOAN ASSOCIATION, JIMMY PHILLIPS, J. T. SUGGS, ET AL., its Organizers and Directors, and J. M. FALKNER, BANKING COMMISSIONER OF TEXAS	)	Third District
RESPONDENTS	)	

This suit was filed by petitioners seeking injunctive and declaratory judgment relief against respondents as a result of proceedings before, and the action of, the State Banking Commissioner, in granting a charter, franchise and certificate to do business to American Savings and Loan Association. Specifically, petitioners sought to set aside the article of incorporation, enjoin the incorporators from doing business under the charter, and in the alternative sought a declar-

atory judgment to the effect that the Commissioner lacked authority to issue a charter because of his non-compliance with the statutory provisions set forth in Article 881a-2, V.A.C.S.

The trial court construed this suit as a collateral attack upon the validity of the charter, and at a pretrial hearing without the introduction of evidence, sustained respondents' pleas in abatement dismissing the suit as to all parties defendant for lack of jurisdiction to hear and determine the cause. On appeal the trial court's action was affirmed by the Austin Court of Civil Appeals, one of the justices dissenting, in an opinion which held that petitioners had no standing to maintain a suit for injunction or declaratory judgment. 326 S. W. 2d 567.

For purposes of brevity, Brazosport Savings and Loan Association, Fort Bend Federal Savings and Loan Association and Gulf Coast Savings and Loan Association are referred to individually or collectively as petitioners. Mr. J. M. Falkner, the State Banking Commissioner, is referred to as the Commissioner. The private respondents are referred to individually or collectively as American.

Petitioners in this case are savings and loan associations operating under charters, franchises and certificates to do business issued by the State Banking Commission pursuant to Article 881a, V.A.C.S. Through their application for writ of error they have presented to this court for determination the question of whether or not such validly operating savings and loan associations have any right to judicial protection

and relief from allegedly unlawful or illegal competition of an association which has been chartered, franchised and certificated in violation of statutory requirements.

The rules and regulations for building and loan associations, as set forth in Article 881a-2, V.A.C.S., require that applications and articles be accompanied by certain data, properly verified and sufficiently detailed and comprehensive, to enable the Commissioner to pass upon a proposed charter. By the same article the Commissioner is charged with the duty of determining the character and fitness of the incorporators, and ascertaining "whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association."

Many irregularities regarding the proceedings conducted by the Commissioner and the subsequent granting of authority to American to do business were alleged by petitioners. These allegations may be summarized as follows: (See Court of Civil Appeals opinion and dissent, 326 S. W. 2d 567, at page 573, for verbatim statement of pleadings.)

Petitioners allege that they are lawfully engaged in the savings and loan business in the territory concerned, are ready, willing and able to serve all public needs, convenience and advantage, their businesses be-

ing affected by public use and interest, conducted for public welfare and benefit, and that their franchises constitute valuable property rights worth many thousands of dollars. Further, that respondents American made application to serve the same area, in competition with petitioners, and filed their application contrary to the form and provisions set forth in departmental rule 2.1 and improperly acknowledged in violation of the requirements of Article 881a-29, V.A. C.S.; that a public hearing was called at which American defaulted, failing to furnish the verified data required by rule 2.1, failed to submit substantial evidence from which the Commissioner could make the determination required by said rule and Article 881a-2, V.A.C.S., and failed to meet and satisfy the proof required by law as to the several elements governing grant of a charter, franchise and certificate to do business; that the Commissioner nevertheless approved American's application, contrary to law and his rules and contrary also to the credible evidence, which is that the public convenience and advantage will not be promoted by the grant to American—in fact, that during the past twelve months the Commissioner has issued franchises to three new associations for Brazoria County, being wholly unjustified action, never elsewhere practiced, and the grant to American was made at a time when neither he nor anyone else could make a fair appraisal of public interests or evaluation of public convenience and advantage as regards American.

Further, that although the rules and regulations require the Commissioner to consider probability of in-

surance of accounts, independent quarters with ground floor location, full time, qualified management and adequate capital and support by the population, no evidence was presented on these matters sufficient to justify the Commissioner's action in making the grant and issuing the certificate to do business. Petitioners pleaded that the population does not and cannot afford a reasonable promise of adequate support, and that in no other comparable area is the population already served by so many associations, mortgage and fiscal concerns; that the credible evidence is the existing associations fully serve the area, need the business, and the grant to American will not only harm them, but will injure the public; that the Commissioner's action was taken without regard to public welfare, and was without support in substantial evidence; that he acted arbitrarily and capriciously, and in violation of law.

While the merits of this case are not before the court, the facts set forth in the allegations above must be taken as true in disposing of the cause. We need only concern ourselves here with the right of petitioners, if such right exists, to challenge the Commissioner's actions.

The objects and business of savings and loan associations are matters of public utility. Although they are privately owned, they operate in the field of public interest like banks, insurance companies, and railroads, and are properly to be considered as quasi-public institutions. Wagner v. Home Savings and Loan Association, Mo. Sup., 90 S. W. 93; Klein v. Jefferson County

Bldg & Loan Ass'n, 239 Ala. 460, 195 So. 593; 35 Words and Phrases, Perm. Ed., pocket part, p. 198; Prudential Building & Loan Ass'n v. Shaw, Tex. Comm. App., 26 S. W. 2d 168, 171. They are financial institutions of major importance to the credit system of the state, and in recognition of their public character such institutions are exempted from the corporate franchise tax in Texas. Acts 1959, 56th Leg., 3d C.S., Ch. 1, Art. 12.03.

Respondents contend that savings and loan associations are mere private corporations and that this action constitutes an attempt to restrict or restrain lawful competition. If respondent's contentions were correct, the rule that ordinary private businesses are not properly entitled to receive protection against competition might be applicable here. 43 Amer. Jur., p. 585. Such is not the case, however, for savings and loan associations are quasi-public in nature, and we do not view petitioners' claim as a right to operate free of competition, but rather as a right to operate free of *unlawful* competition, created in violation of law.

Savings and loan associations, for the privilege of operating within the state, may be subjected to reasonable regulations and control. As stated in 9 American Jurisprudence, Building and Loan Associations, Sec. 8, at p. 102:

> "In view of their quasi-public character, the state may, under its police power, subject them to a degree of supervision and regulation which would be unnecessary and unreasonable in the case of purely private corporations."

If savings and loan associations were merely corporations engaging in private business, unaffected by the public interest, the state could not lawfully require a showing of public necessity or convenience. New State Ice Co. v. Liebman, 285 U. S. 262, 76 L. Ed. 747. A necessary corollary to this requirement and the regulation and and control exercised by the state is freedom from illegal or unlawful competition. Such competition would be indirectly, if not directly, inimical to the public welfare.

The majority opinion of the Court of Civil Appeals states that the petitioners have no vested property right in the charter and certificate granted by the Commissioner to American. We are unable to determine that they claim such a right. The rights which are asserted and which petitioners seek to protect are in their own corporate beings and in the vested property rights in their own franchises. Franchises have long been considered as property in Texas. City of Wichita Falls v. Kemp Hotel Operating Co., 162 S. W. 2d 150, 153, affirmed 141 Tex. 90, 170 S. W. 2d 217; 19 Tex. Jur., p. 876. Franchises have also been described as vested rights. Laidlaw Bros., Inc. v. Marrs, 114 Tex. 561, 273 S. W. 789. See also 23 American Jurisprudence, Sec. 5, p. 717.

> "In character and nature a franchise is essentially in all respects property, and is governed by the same rules as to its enjoyment and protection and is regarded by the law precisely as other property. Invasion of a franchise is an invasion of a property right. The holder has such an interest as entitled him to defend any invasion, whether

by a public body or an individual. * * * * *" 19 Tex. Jur., Franchises, Sec. 3 at p. 876.

A franchise on which money has been expended assumes the character of a vested right. 12 Tex. Jur. 2d, Constitutional Law, Sec. 116, p. 464; Corpus Christi Gas Co. v. City of Corpus Christi, 283 S. W. 281, error refused.

When a vested property right has been adversely affected by the action of an administrative body so as to invoke the protection of due process, an inherent right of appeal is recognized. City of Amarillo v. Hancock, 150 Tex. 231, 239 S. W. 2d 788.

Article 881a, V.A.C.S., is silent with regard to an appeal from an action of the Commissioner in the granting of a charter and franchise. The fact that the statute fails to afford petitioner an appeal or judicial review has been held to be immaterial, for there are instances where courts must assume jurisdiction. Such jurisdiction is required in order that the administrative body may function where, without the right of appeal, the courts would have been forced to strike down the statute. City of Amarillo v. Hancock, supra. This court has often approved the holding in English Freight Co. v. Knox, 180 S. W. 2d 633, error refused:

> "Such right of appeal will be implied or arises under the constitutional guaranties of due process of law, if the matter is one so protected."

We believe that the question of judicial review now before us is controlled by the decision in the case of Board of Insurance Commissioners et al. v. Title In-

surance Association of Texas et al., 153 Tex. 574, 272 S. W. 2d 95. There it was argued that Article 1.19 of the Insurance Code prevented anyone but the Board from challenging the right of its licensee to carry on the business of title insurance. This court, in recognition of the rights of competitors to challenge the illegal operation said:

> "* * * We cannot ascribe to the Legislature the intention to provide by that Article that an order entered by the Board can be attacked for invalidity only by the Board itself. Such construction of the Article would, to say the least, render it of doubtful validity.
>
> "There is no provision in the statute for an appeal * * *, but the right of proper parties to subject such an order to judicial review must be implied. The property rights of parties cannot be determined by orders of an administrative agency, without a right of judicial review of such orders. * * * *
>
> "It is argued that respondents have no right to prevent competition in their business. That would be a correct proposition in the transaction of ordinary business enterprises if the competition is not illegal, but, as well stated in the opinion of the Court of Civil Appeals (264 S. W. 2d 132):
>
> " 'The business of title insurance is one affected by public use, is of public interest, and is subject to reasonable legislative control. Daniel v. Tyrell & Garth Inv. Co., 127 Tex. 213, 93 S. W. 2d 372. * * *' "

Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483, was heavily relied upon by

this court in the Title Insurance case, and was recognized by the Court of Civil Appeals as "a close analogy." (264 S. W. 2d at 132). There, plaintiff was the holder of a public necessity permit to operate a gin, having obtained such upon proper showing of "necessity." The state commission granted a permit to plaintiff's competitor without regard to public necessity. Plaintiff sued to enjoin such an illegal operation and got his relief. The court said of plaintiff's rights:

> "* * * the right to operate a gin * * * as provided by the Oklahoma statute, is not a mere license, but a franchise, granted by the state in consideration of the performance of public service; and as such it constitutes a property right within the protection of the 14th Amendment.
>
> "* * * * * * *
>
> "Appellant, having complied with all the provisions of the statute, acquired a right * * * by valid grant * * *. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity * * *.
>
> "* * * * * * * *
>
> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. * * *.
>
> "* * * That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by

multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statute were enforced. * * *"

Many decisions support the propositions stated by this court, and by the Supreme Court of the United States in these two cases.

In accordance with prior decisions of this and other courts with which we agree, we believe that petitioners possess a valuable and vested property right in their franchises. Petitioners' allegations of fact that this right has been infringed upon by the action of the Commissioner must be taken as true in view of the procedural status of the case. Therefore, we hold that petitioners are entitled to an opportunity to prove their allegations that the Commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved. Such an opportunity is afforded to petitioners by the due process clauses of the Constitution of this state and of the United States. Vernon's Ann. St. Const., Art. I, Sec. 19; U.S.C.A. Const. Amend. 14.

The judgments of the district court and Court of Civil Appeals dismissing the cause for lack of jurisdiction are reversed and the cause is remanded for trial on the merits.

Robert W. Hamilton
Associate Justice

Associate Justice Steakley not sitting.
Opinion delivered: February 15, 1961

IN THE SUPREME COURT OF TEXAS

— — — — —

IN CHAMBERS

September 10, 1963.

No. A-8874.

Jimmy Phillips et al.	)	
vs.	)	From Travis County,
Brazosport Savings & Loan	)	Third District.
Association et al.	)	

The stipulation of the parties for additional time to appellants for docketing the case and filing of record and jurisdictional statement in the Supreme Court of the United States and request to the Supreme Court of Texas for an order granting time extension, this day filed herein, having been duly considered by the Court, in chambers, it is

ORDERED that Brazosport Savings & Loan Association et al., respondents in this Court and appellants in the Supreme Court of the United States, be, and hereby are, granted an extension of time to and including October 21, 1963, within which to docket the case, file the record and file their jurisdictional statement in the Supreme Court of the United States. Rule 13, (1), Rules of the Supreme Court of the United States.

It is further ordered that the Clerk of this Court include a true copy of the stipulation upon which this order is entered, and a true copy of this order, in the record prepared for appeal to the Supreme Court of the United States.

— — — — — — —

PORTIONS OF RULES AND REGULATIONS FOR BUILDING AND LOAN ASSOCIATIONS

PROMULGATED BY

THE BUILDING AND LOAN SECTION OF THE FINANCE COMMISSION OF TEXAS

AND

THE BANKING COMMISSIONER OF TEXAS

"CHAPTER 2. NEW CHARTER APPLICATIONS

"2.1. When articles of incorporation of a new association are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed By-Laws of the association and statements, exhibits, maps and other data properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to (1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage will be promoted by allowing such proposed association to be incorporated and engage in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings and Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, (c) that such proposed association will have qualified, full-time management,

and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association.

"2.2. Within ten (10) days after the filing of a proper application the Banking Commissioner shall set a date for a hearing on the application, and the proposed incorporators shall publish at least twenty (20) days before the date of the hearing, in a newspaper printed in the English language of general circulation in the county where the proposed association will have its principal office, a notice in the following form, unless another form is prescribed by the Commissioner:

"* * *

"In addition, the Commissioner shall mail notice of such hearing by registered or certified mail to all State and Federal Building and Loan Associations in the county of the proposed location or in any adjoining or adjacent counties within a proximity that might be served or affected by the proposed association.

"2.3. At least ten (10) days before the hearing date the proposed incorporators shall file proof of publication in the manner above provided with the Commissioner, and if ten (10) days before the hearing date the Commissioner has received no written statements of intention to appear in person or by attorney to protest the application from one or more parties, the hearing may be cancelled by the Commissioner. The Commissioner shall notify the proposed incorpo-

rators at least five (5) days before the date of the hearing whether or not a hearing will be held.

"2.4. The Commissioner shall render his decision within forty-five (45) days after the hearing or after the date on which the hearing is cancelled, and at the time he makes his decision on the application he shall file in his office a written memorandum stating the reasons therefor, which shall be open to public inspection.

"2.5. When requested by the proposed incorporators, a hearing shall be held on the application even though there are no persons who have indicated a desire to be heard against it."

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 10 1963
JOHN F. DAVIS, CLERK

No. 565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, and GULFCOAST SAVINGS & LOAN ASSOCIATION, *Appellants*

v.

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL., *Appellees*

On Appeal From The Supreme Court of Texas

APPELLEES' MOTION TO DISMISS OR AFFIRM

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BRAZOSPORT SAVINGS & LOAN ASSOCIATION, FORT BEND FEDERAL SAVINGS & LOAN ASSOCIATION, and GULFCOAST SAVINGS & LOAN ASSOCIATION, *Appellants*

v.

JIMMY PHILLIPS, AMERICAN SAVINGS & LOAN ASSOCIATION, J. M. FALKNER, BANKING COMMISSIONER OF TEXAS, ET AL., *Appellees*

On Appeal From The Supreme Court of Texas

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, J. M. FALKNER, Banking Commissioner of Texas, AMERICAN SAVINGS & LOAN ASSOCIATION, and the individual incorporators of that organization, pursuant to Rule 16 of the revised rules of this Court, move to dismiss the appeal or alternatively to affirm the decision and judgment of the Supreme Court of the State of Texas,

from which decision and judgment the instant appeal has been taken. This motion is based upon the following grounds:

(1) Appellants are attempting to attack the very statute upon which they rely for their own existence.

(2) No substantial federal question is presented in that

(a) Appellants were accorded due process and equal protection of the laws, and

(b) the statute upon which the complaint is based has been amended.

(3) In part the federal questions sought to be raised were neither timely nor properly raised.

(4) The judgment of the Supreme Court of the State of Texas rests upon adequate non-federal bases.

STATEMENT OF THE CASE

After a hearing on December 15, 1958, the Banking Commissioner of Texas on January 23, 1959, issued an order granting a charter to American Savings & Loan Association (Plaintiffs' Exhibit 20). Application therefor (Plaintiffs' Exhibit 15) had been filed by the persons who are the individual Appellees before this Court.

The then controlling statute, Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas, provided in part:

> "When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the minimum capital required

> has been paid in cash into the treasury of the association upon subscriptions for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association."[1]

Rules and regulations for savings and loan associations (Plaintiffs' Exhibit 6-b), adopted in compliance with Article 342-114, Vernon's Annotated Civil Statutes, authorizing the promulgation of "general rules and regulations not inconsistent with the Constitution and statutes of this state," permitted the Banking Commissioner, in passing upon applications for savings and loan associations, to hold hearings at which both applicants and protestants could present whatever evidence they chose.

Appellants, who had appeared at and participated in the American Savings & Loan application hearing before the

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[1] The statute has since been specifically repealed by and in the adoption of the Texas Savings & Loan Act (Acts, 1963, 58th Leg., Ch. 113, p. 269). The statute in full is reproduced in the appendix to this motion, as is the pertinent portion of the amendatory or new statute now in effect.

Banking Commissioner, filed suit in the 126th District Court of Travis County, Texas, seeking to set aside the Banking Commissioner's order approving the charter application. The then applicable statute, Article 881a-3, Vernon's Annotated Civil Statutes,[2] specifically provided for appeal only on behalf of those whose charter applications had been denied. No previous attempt had been made to review in the courts an order of the Banking Commissioner granting a savings and loan charter. The State, acting on behalf of the Banking Commissioner, took the position that the order was not appealable. The trial court and the Court of Civil Appeals entered judgments sustaining that position. *Brazosport Savings & Loan Association v. Phillips*, 326 S.W.2d 567 (Tex.Civ.App., 1959). The Supreme Court of Texas, however, reversed both of the lower courts, holding in *Brazosport Savings & Loan Association, et al. v. American Savings & Loan Association, et al.*, 161 Tex. 543, 342 S.W.2d 747 (1961), that the protesting savings and loan associations who are Appellants here were "entitled to an opportunity to prove their allegation that the Commissioner's action was illegal or without support in substantial evidence, and to appropriate relief if this be proved." No motion for rehearing was filed by either party, and the litigation from which this appeal is taken resulted.

The trial court hearing on the merits, in conformity with established Texas procedure governing appeals from administrative orders, provided a de novo review of all evidence in existence at the time the order of the banking

[2] That provision was also specifically repealed by the adoption of the new Texas Savings and Loan Act cited above.

Commissioner was issued.[3] Appellants were permitted to introduce in evidence a transcript of the hearing before the Banking Commissioner (Plaintiffs' Exhibit 21, Transcript, p. 163); the report of the investigator for the Banking Commissioner was made available to the Appellants and was also introduced in evidence (Plaintiffs' Exhibit 27, Transcript, p. 214); and Appellants were given unrestricted opportunity to introduce any and all evidence which they considered pertinent.

Stripped of its verbosity, Appellants' statement of the case to this Court (Jurisdictional Statement, pp. 16-26) reveals that Appellants purport to have been unable adequately to oppose the chartering of American Savings & Loan Association because (1) the data to be relied upon in support of the application was not filed with the agency prior to the administrative hearing, and (2) the report of the Banking Commissioner's own independent investigation of the application was not introduced in evidence at the administrative hearing.

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[3] In **Southern Canal Company v. State Board of Water Engineers**, 159 Tex. 227, 318 S.W.2d 619 (1958), the Supreme Court of Texas described review of an administrative order as "a type of de novo trial in that the evidence is heard anew and the reasonableness of the agency's action is independently adjudged by the court on the basis of evidence admitted in the judicial proceeding." Similarly in **Board of Water Engineers v. Colorado River Municipal Water District**, 152 Tex. 77, 254 S.W.2d 369 (1953), the Texas Supreme Court explained that in an appeal from an administrative order the trial court "makes an independent determination from the evidence adduced at the trial of whether the administrative order is reasonably supported by substantial evidence." This court denied certiorari, **Colorado River Municipal Water District v. Board of Water Engineers**, 346 U.S. 815, 74 S.Ct. 25, 98 L.Ed. 342 (1953). Comparable holdings include **Thomas v. Stanolind Oil & Gas Company**, 145 Tex. 270, 198 S.W.2d 420 (1946); **Trapp v. Shell Oil Company**, 145 Tex. 323, 198 S.W.2d 424 (1946); **Transport Company of Texas v. Robertson Transports**, 152 Tex. 551, 261 S.W.2d 549 (1953); **Davis v. City of Lubbock**, 160 Tex. 38, 326 S.W.2d 699 (1959).

Contrary to Appellants' inferences here, neither the then applicable statute, Article 881a-2, Vernon's Annotated Civil Statutes, nor Rule 2.1 of the Rules and Regulations required the filing of such data prior to the hearing. The rule (included in Plaintiff's Exhibit 6-b) reads:

> "2.1 When articles of incorporation of new associations are presented to the Banking Commissioner for his approval, such articles shall be accompanied by the proposed by-laws of the association and statements, exhibits, maps and other data properly verified, which shall be sufficiently detailed and comprehensive to enable the Commissioner to pass upon the proposed charter as to (1) the character, responsibility and general fitness of the persons named in the articles; (2) whether the public convenience and advantage will be promoted by allowing such proposed association to be incorporated and engaged in business, taking into consideration (a) that insurance of the accounts of the proposed association has been applied for and that such insurance will probably not be refused by the Federal Savings & Loan Insurance Corporation, (b) that such proposed association will have and maintain independent quarters with a ground-floor location or its equivalent, and (c) that such proposed association will have qualified full time management, and (d) the adequacy of the initial capital and surplus of the proposed association; and (3) whether the population of the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed association."

The pertinent phraseology with regard to the time specified by the rule is "when the articles of incorporation of a new association are presented to the Banking Com-

missioner for his approval." The meaning of that phrase is made clear by other rules relating to new application procedure. Rule 2.2 directs the Commissioner "after the filing of a proper application" to set a date for hearing. Rule 2.3 specifies that the Commissioner shall notify the proposed incorporators at least five (5) days before the date set for the hearing whether or not a hearing will be held. If a hearing is to be held, that is the time when the articles of incorporation are *presented* to the Banking Commissioner for his approval and that, therefore, is the time specified by Rule 2.1 for the presentation of the supporting data. If no hearing is to be held, the articles of incorporation would be "presented to the Banking Commissioner for his approval" after notice of the fact that no hearing was to be held had been received.

The mere fact that Rule 2.2 uses the term "filing" while Rule 2.1 uses the phrase "when . . . presented to the Banking Commissioner for his approval" indicates that different times were intended by the two rules.

That construction is entirely logical. The "supporting data" is the evidence to be presented in behalf of the applicants. If the proceeding is to be adversary (that is, if other savings and loan associations give notice of an intention to protest and if a hearing is to be held), it would be most unreasonable to require the applicants to put all of their evidence in documentary form and give their adversaries advance notice of the precise facts which they intend to offer at the hearing.

The Supreme Court of the State of Texas in the decision here appealed, *Phillips v. Brazosport Savings & Loan Association*, ____ Tex. ____, 366 S.W.2d 929 (1963), clearly approved and accepted that construction saying:

> "The Commissioner testified at the trial that it has been his custom not to require the filing of this data if there was to be a hearing. Whether there was to be a hearing depended upon whether or not there were protestants who wished to challenge the granting of the charter. (Rule 2.3 of the Rules and Regulations) Since there was to be a hearing petitioners did not file accompanying data."

After quoting Article 881a-2, Vernon's Annotated Civil Statutes, the statute with which the rule was required to conform, the court continued:

> "The statutory mandate is that the Commissioner must find (1) that the character of the incorporators is satisfactory, (2) that the public convenience and advantage will be served by the granting of the charter and (3) that the population will support a building and loan association. The statute gives the Commissioner the power to ascertain [these facts] from the best sources at his command, and by such investigation as he may deem necessary. The statute nowhere requires that the Commissioner require the filing of this supporting data at the time of filing the articles of association. This rule is one which the Finance Commission has enacted for the convenience of the Banking Commissioner. The filing of this data merely provides the Banking Commissioner with another source of information. Nothing in the rule imports that its purpose is to acquaint a protestant with the evidence which an applicant is relying on. The Commissioner testified at the trial that his practice has been not to require the filing of the data when there is to be a hearing. He relies on the hearing and other sources of data necessary to a determination as to population, character, and public convenience and advantage. This interpretation of the rule is in

> harmony with the statute, since the statute gives him discretion to gather data from the best sources at his command."

Replying specifically to the precise contention which Appellants are seeking to raise in this Court, the Texas Supreme Court continued:

> "Respondents [Appellants here] contend that they have been deprived of their constitutional rights by the failure of petitioners to file the data, in that they were not able to properly prepare for the hearing, not knowing what evidence was to be offered by the applicants. This is untenable. In the first place, the rule does not provide that the data be filed before the hearing, but upon presentation to the Commissioner for approval. This could well mean at the hearing. In the second place, we can find no unfairness in the Commissioner's not requiring the filing of such data before the hearing was held because the respondents knew exactly who the incorporators were, they knew the town in which the association was to be located, and what the factual issues would be, since they are set out by the statute.
>
> "Respondents had ample opportunity after notice to prepare for the hearing. They knew that in order for the Commissioner to grant the charter he would have to be satisfied as the character of the incorporators, as to the public advantage and convenience for granting the charter, and that the population showed promise of sufficient support for the association. If one or more of the conditions could not be met, respondents had every opportunity of showing the necessary facts to the Commissioner."

Appellants' second ground of complaint is that the report of the investigator for the Banking Commissioner

was not introduced in evidence at the administrative hearing. In their review of the evidence (Jurisdictional Statement, page 21), Appellants conveniently omit reference to the fact that the field investigator's report (Plaintiff's Exhibit 27) is dated December 13, 1958, two days before the hearing and the further fact that the report shows on its face that R. C. Findlay, vice-president of Brazosport Savings & Loan Association, was one of the persons interviewed by the investigator and that he "registered objection" to the chartering of American Savings & Loan. That fact was in no way disputed by the Appellants. Moreover, Findlay himself testified that with regard to the American Savings & Loan application he was interested both in his own behalf "and in behalf of the other savings and loan associations who protested the application" (S.F. 69). In response to Appellants' contentions on this point in that court, the Supreme Court of Texas first noted that the then applicable statute, Article 881a-2, Vernon's Annotated Civil Statutes, did not require a hearing of any kind, that a long established Texas rule permitted administrative agencies to rely upon their own office records, and then, with specific application to the facts in evidence, held that:

> "Since the statute expressly authorizes the Commissioner to make an independent investigation and to rely on the results thereof in making his determination, respondents are charged with notice of the likelihood of such an investigation and report. Moreover, before the hearing, investigator Benson interviewed officers of two of the protesting building and loan associations, thus putting them on actual notice that the Commissioner was exercising his authority to make an independent investigation. Yet the respondents

> [Appellants] participated in the administrative hearing before the Commissioner without once demanding to see the data collected by the investigators."

Even more significant, however, than the fact that the Commissioner did not refuse to place the report in evidence at the administrative hearing is the further fact that, at the hearing on the merits in the trial court, the full report was introduced in evidence (Plaintiff's Exhibit 27). Not only did Appellants have ample opportunity, had they been able to do so, to refute any statement made in the investigator's report, but it is also abundantly clear that Appellants must have known the topics to be covered by the report. The report was necessarily limited to the matters which the statute, Article 881a-2, Vernon's Annotated Civil Statutes, required the Commissioner to investigate. Moreover, although Appellants, as plaintiffs in the trial court, offered evidence in opposition to the granting of the charter, they made no effort whatsoever to dispute any factual statement contained in the investigator's report.

APPELLANTS ATTACK THE STATUTE UPON WHICH THEY RELY FOR THEIR OWN EXISTENCE

Appellants identify as the statute brought into question by this appeal Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas. They fail to note, however, that the Appellants, Brazosport Savings & Loan Association and Gulf Coast Savings & Loan Association, were organized and attained their status as corporate bodies upon the authority of that same identical statute. They are, therefore, in the untenable position of both relying upon the statute for their own existence and attacking its con-

stitutionality in the creation of a competitive organization. It has long been established that a party cannot both assail and rely upon a statute in the same proceeding. *Hurley v. Commission of Fisheries of Virginia*, 257 U.S. 223, 42 S. Ct. 83, 66 L. Ed. 206 (1921). As this Court noted in *Frost v. Corporation Commission of the State of Oklahoma*, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 487 (1929), "it is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding."

Effort was made to avoid application of the rule in *Fahey, et al. v. Mallonee, et al.*, 332 U.S. 245, 255, 256, 67 S. Ct. 1552, 91 L. Ed. 2030 (1947), where stockholders rather than the association itself instituted the cause of action. This Court, however, refused to act on the basis of the subterfuge and instead applied the rule, saying:

> "This is a stockholder's derivative action in which plaintiffs sue only in the right of the Association. It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.' United States v. City and County of San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050. As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S. Ct. 466, 483, 80 L.Ed. 688, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'
>
> "In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars,

> hardly severable from those provisions which grant its right to exist . . . It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions."

Upon the basis of that holding, this Court reversed the decision of the three-judge court below. The rule, as stated by Mr. Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936), that "the court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits" is clearly applicable either to appeal or to application for certiorari. It is Appellees' position that it is directly in point in the case at bar.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Appellants assert that this proceeding presents four (4) federal questions which, stripped of Appellants' self-serving legal conclusions, may be briefly stated as:

(1) Whether Appellants, as existing savings and loan associations, were denied due process and equal protection of the laws in the conduct of the administrative hearing on the chartering of a competitive savings and loan association under the then established administrative procedure for the chartering of such organizations.

(2) Whether an order of the Banking Commissioner, subject to a complete judicial review of all determinative facts, violates the due process and equal protection clauses if the Banking Commissioner, as specifically authorized by

statute, relies, in issuing that order, on independent administrative investigation as well as upon evidence presented at a hearing on the application by both the applicants and the protestants.

(3) Whether Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas, in authorizing the Banking Commissioner of Texas to make independent investigation of savings and loan applications, is violative of the due process and equal protection clauses of the federal constitution.

(4) Whether judicial review under the substantial evidence rule, including a de novo consideration of all pertinent facts in existence at the time of the issuance of the order, afforded Appellants due process and equal protection of the laws.

When the above questions are considered in the light of the foregoing statement of the case, however, it is apparent that in reality only one question is raised. That question is whether Appellants were accorded procedural due process and were given equal protection of the laws in their efforts to protest and to set aside an order of the Banking Commissioner granting a charter to a competitive savings and loan association.

(a) Appellants have been accorded due process and equal protection of the laws.

The term, "due process of law," has "never been one of fixed and invariable content." *Federal Communications Commission v. WJR, the Goodwill Station*, 337 U.S. 265, 275, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949). It "guarantees no particular form of procedure." *National Labor Re-*

lations Board v. Mackey Radio & Telegraph Company, 304 U.S., 333, 351, 58 S. Ct. 904, 82 L. Ed. 1381 (1938). The requirements of due process frequently vary with the type of proceeding involved. *Hannah v. Larche*, 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), rehearing denied 364 U.S. 420, 81 S. Ct. 33, 5 L. Ed. 2d 79 (1960). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944), this Court said:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case."

Appellants, as existing savings and loan associations, have only "local franchises" which "while having elements of property, confer no contractual or property right to be free of competition." *Tennessee Electric Power Company v. Tennessee Valley Authority*, 306 U.S. 118, 139, 59 S. Ct. 366, 83 L. Ed. 543 (1939). Appellants assert reliance upon *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929), but they failed to bring themseves within the rule there applied. In discussing that decision, this Court in *Alabama Power Company v. Ickes*, 302 U.S. 464, 484-485, 58 S. Ct. 300, 82 L. Ed. 374 (1938), explained:

> "Frost v. Corporation Commission, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of

> Durant, Okl., for the operation of which he had a license from the Corporation Commission. The law of Oklahoma, Comp. Laws 1921, § 3713 [17 Okl. St. Ann. § 42], provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing gin without a permit or under a void permit. The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction against the commission and the Durant company. See Corporation Commission v. Lowe, 281 U.S. 431, 435, 50 S.Ct. 397, 398, 74 L.Ed. 945. The difference between the Frost Case and this is fundamental; for the competition contemplated there was unlawful while that of the municipalities contemplated here is entirely lawful."

The above holding makes it abundantly clear that one seeking to protect itself from competition has the burden of establishing the illegality or absence of legality of the proposed competition. Appellants have not sustained that burden. Neither have they shown that in any way they were treated differently from any other standing in the same position. As this Court noted in *Morey v. Doud*, 354 U.S. 457, 463, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957), the "established proposition" is that the "prohibition of the

Equal Protection Clause goes no further than the invidious discrimination," and that one who assails a state law on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment "must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary."

The asserted federal questions indicate that Appellants' attack on both constitutional grounds is directed at four (4) stages or incidents in the chartering of American Savings & Loan Association: (1) the administrative hearing, (2) the independent administrative investigation, (3) the controlling statute, and (4) the judicial review.

With regard to the administrative hearing, it is undisputed that Appellants received notice, appeared (S.F. 143-144) and were given an opportunity to and did present evidence (Transcript of the hearing before the Banking Commissioner, Plaintiffs' Exhibit 21). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 244, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944), this Court said:

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

Appellants do not challenge the Banking Commissioner's testimony that the hearing was conducted in the customary manner (S.F. 145-156, 162). Their complaints are only that the applicants for charter did not file their supporting data or evidence prior to the hearing and that the report of the independent investigator for the Banking Commissioner was not introduced in evidence. The Bank-

ing Commissioner did not construe the rules as requiring either that the evidentiary matter be filed prior to the hearing or that the results of his independent investigation be placed in evidence at the hearing (S.F. 100, 110).

The Texas Supreme Court in the decision here subject to appeal approved and adopted the Banking Commissioner's construction of the rules. The construction of a state statute or rule promulgated in compliance with a statute by a state supreme court is binding upon this Court. *United States v. Burnison*, 339 U.S. 87, 70 S. Ct. 503, 94 L. Ed. 675 (1950). Since Appellants' first question is grounded solely upon their own construction of the rules, which is contrary to the construction given the rules by the state Supreme Court, no substantial federal question is presented. *Black v. Cutler Laboratories*, 351 U.S. 292, 76 S. Ct. 824, 100 L. Ed. 1188, rehearing denied 752 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69 (1956). Moreover, Appellants' position is clearly contrary to this Court's holding in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894, 81 S. Ct. 1743, 6 L.Ed. 2d 1230 (1961), rehearing denied 368 U.S. 869, 82 S. Ct. 22, 7 L. Ed. 2d 70 (1962), where, with specific regard to administrative action, it was explained that due process "does not require a trial type hearing in every conceivable case of government impairment of private interest."

The above noted principle is particularly applicable here since the trial on the merits provided a complete review of all evidence, including the investigator's report.

Appellants' second asserted federal question overlaps the first in that it is directed at the use of the investigator's report. Moreover, the second question cannot properly be

considered independently of the statute which authorized the investigation, Article 881a-2, Vernon's Annotated Civil Statutes, which is the subject of Appellants' third asserted question.

With regard to the investigation, the Banking Commissioner testified that he presumed that "everybody, protestant and applicants both, were cognizant of the fact that an investigation had been made" (S.F. 110). Clearly there was abundant reason for his presumption. The then applicable statute not only authorized but required the Banking Commissioner to "ascertain from the best sources at his command and by such investigation as he may deem necessary" the various matters to be determined in the granting of a savings and loan application. The use of such investigations was an established procedure of the banking department on applications for either state-chartered banks or savings and loan associations. *Falkner v. Gibraltar Savings & Loan Association*, 348 S.W. 2d 467 (Tex. Civ. App., 1961, writ refused, n.r.e.); *Falkner v. Gibraltar Savings & Loan Association*, 348 S.W. 2d 472 (Tex. Civ. App., 1961, writ refused, n.r.e.); *Farb v. State Banking Board*, 343 S.W. 2d 508 (Tex. Civ. App., 1961, writ refused, n.r.e.). Moreover, with regard to administrative matters in general, the courts of the State of Texas have long and consistently held that the agencies are not confined to evidence actually brought out at a hearing but may rely upon information disclosed by their own office records. *Railroad Commission v. McDonald*, 90 S.W. 2d 581 (Tex. Civ. App., 1936); *Northeast Texas Motor Lines v. Texas & Pacific Motor Transport Company*, 159 S.W. 2d 926 (Tex. Civ. App., 1941); *Texas Industrial Traffic League v. Railroad Commission*, 255 S.W. 2d 903 (Tex.

Civ. App., 1953, writ refused, n.r.e.); *Alamo Express v. Union City Transfer*, 158 Tex. 234, 309 S.W. 2d 815 (1958). In *Anderson National Bank v. Luckett*, 321 U.S. 233, 244, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944), this Court noted that:

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years'. Coler v. Corn Exchange Bank, 250 N.Y. 136, 141, 164 N.E. 882, 884, 65 A.L.R. 879, affirmed sub nom. Corn Exchange Bank v. Coler, Commissioner, supra. To that effect, see Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140, 154, 26 S. Ct. 353, 355, 50 L. Ed. 696; Ownbey v. Morgan, 256 U.S. 94, 108, 109, 112, 41 S. Ct. 433, 437, 438, 65 L. Ed. 837, 17 A.L.R. 873; Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S. Ct. 9, 10, 67 L. Ed. 107; Corn Exchange Bank v. Coler, Commissioner, supra, 280 U.S. at pages 222, 223, 50 S. Ct. at page 95, 74 L.Ed. 378; Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 110, 111, 54 S. Ct. 330, 334, 78 L. Ed. 674, 90 A.L.R. 575."

In situations far more comparable with the facts in the case at bar than revealed in any of the decisions cited by Appellants, it has repeatedly been held that consideration of matters not specifically introduced in evidence at an administrative hearing does not constitute a denial of due process. For example in *Starr v. Fleming*, 159 F. 2d 867 (Em. Ct., 1947), the court held that a protestant was not denied due process in a protest proceeding because the price administrator incorporated an affidavit into the record of proceedings without giving the protestant an opportunity to rebut it.

Again, in *National Labor Relations Board v. Botney Worsted Mills*, 106 F. 2d 263 (3rd Cir., 1939), the court held that the action of the National Labor Relations Board in hearing ex parte a person who had not acted as counsel before the trial examiner and was not connected with the prosecution of the case was not a denial of due process.

Even more comparable to the case at bar is *American & European Agencies v. Gilliland*, 247 F. 2d 95 (U. S. Ct. App., D.C., 1957), certiorari denied 355 U.S. 884, 78 S. Ct. 152, 2 L. Ed. 2d 114 (1957). There, as in the case at bar, a hearing was held, but a staff memorandum considered by the Commission was not offered in evidence. In holding that the use of the memorandum did not constitute a denial of due process, the court distinguished two of the cases upon which Appellants here rely, saying:

> "*Appellant concedes that it was accorded a hearing* in which it had opportunity to present its views and to offer evidence to support the merits and proper valuation of its claim. Its assertion is that the constitutional right to a hearing includes the right to know and meet the claims of the opposing party, citing Morgan v. United States, 1938, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129, and Ohio Bell Telephone Co. v. Public Utilities Commission, 1937, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093, and that here *it was not furnished a staff memorandum on which the Commission relied in making its determination of value.* It says that the Commission should have accorded it a further hearing wherein it could offer evidence designed to rebut the conclusions of the memorandum. The cited cases established the requirements of a fair hearing in situations where a governmental agency was affirmatively acting to the detriment of the complaining party by fixing maxi-

> mum rates (Morgan) or by lowering rates and ordering the complainant to make refunds (Ohio Bell Telephone). The Foreign Claims Settlement Commission is not engaged in that kind of task; . . . while it is perhaps true that some minimal form of hearing is necessary even for the performance of . . . a governmental function, *due process in these circumstances surely does not require more than an opportunity for the claimant to be heard.* Appellant concedes it was accorded this much." (Emphasis added)

In noting the applicability of the above holding to the instant case, it should be recalled that Appellants' sole interest in the proceedings here in question is their desire to prevent the operation of a competive savings and loan association. "What procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961), rehearing denied 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed.2d 70 (1962).

Moreover, in the instant case only specific statutory issues controlling the granting of savings and loan applications could have been involved in the investigation. Knowing those issues, Appellants obviously could introduce any evidence which they considered pertinent. "Due process of law is afforded where there is opportunity to be heard before the body which makes the assessment [or decision], and the Legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned." *Hibben v. Smith*, 191 U.S. 310, 24 S. Ct. 88, 48 L. Ed. 195 (1903). Appellants not only

appeared and offered evidence at the administrative hearing, but they were granted an opportunity to subject the decision of the Banking Commissioner to judicial review. That review, despite the fact that it is the subject of Appellants' last asserted question, conclusively establishes that all possible requirements of due process and equal protection were afforded. Directly in point is this Court's explanation in *Anderson National Bank v. Luckett*, 321 U.S. 233, 246-247, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824 (1944):

> ". . . it is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial review."

Similarly in *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), rehearing denied, 340 U.S. 857, 71 S.Ct. 69, 95 L.Ed. 627 (1950), this Court, citing earlier holdings on the same point, said:

> ". . . it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611, 75 L.Ed. 1289; Bowles v. Willingham, 321 U.S. 503, 520, 64 S.Ct. 641, 650, 88 L.Ed. 892; Yakus v. United States, 321 U.S. 414, 442-443, 64 S.Ct. 660, 675, 676, 88 L.Ed. 834."

Apparently in recognition of that conclusively established rule, Appellants seek to attack the type of review which they were accorded in the Texas courts, but, contrary to Appellants' inferences and designation of "limited," the substantial evidence rule as applied in the courts of this jurisdiction provides a more, rather than a less, extensive review than is normally accorded administrative orders. In explaining the Texas practice, the Supreme Court of the State in *Jones v. Marsh*, 138 Tex. 326, 224 S.W.2d 198, 202 (1949), said:

> "Stating again the substantial evidence rule, it is that the finding of the administrative body or agency will be sustained by the court if it is reasonably supported by substantial evidence, *meaning evidence introduced in court.* It is for the court, whether trial or appellate, to determine as a matter of law the reasonableness of the support afforded by substantial evidence, and in making its decision of this question the court examines and takes into consideration all of the evidence." (Emphasis added)

In Texas the trial court has the duty of evaluating the evidence. *Board of Firemen's Relief & Retirement Fund v. Marks*, 150 Tex. 433, 224 S.W.2d 181, 27 A.L.R. 2d 965 (1951). Determination is made by "a review of the entire record after a full and final hearing in the trial court." *Transport Company of Texas v. Robertson Transports*, 152 Tex. 551, 261 S.W.2d 549 (1953). All "evidence is heard anew." *Southern Canal Company v. State Board of Water Engineers*, 159 Tex. 227, 318 S.W.2d 619 (1959).

Obviously review of that type is in complete contrast with the proceedings which this Court condemned in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed.

1093 (1937), one of the major cases relied upon by Appellants here. In describing the facts there before it, this Court in that case noted (301 U.S. 300):

> "The company . . . asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. *The putative debtor does not know the proofs today.*" (Emphasis added)

At another point in the same opinion, it was further explained that (301 U.S. 302-303):

> "Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in fathering them it went to journals and tax lists . . ."

Such facts are in no way comparable with those now before the court. Appellants in the case at bar were provided with the investigator's report which is the basis of their complaint; it was introduced in evidence at the trial (Plaintiff's Exhibit 27) and is now before this court. In conformity with established Texas practice, both Appellants

as Plaintiffs and Appellees as defendants in the trial court were given a full and complete opportunity to introduce or to rebut any matter which might have been considered in arriving at the order in question. Upon the basis of that complete hearing in the trial court, the Supreme Court of Texas entered the judgment which is the subject of this appeal. In that respect also the review in the case at bar is markedly different from that accorded in the *Ohio Bell* case, which this Court described as (301 U.S. 303-304):

> ". . . under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit . . . A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling . . . In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below [at the administrative hearing] *and not upon new evidence*. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? . . . What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.'"

Thus, in pointing out the defects in the Ohio procedure, this Court, at least by inference if not expressly, approved the precise type of review which the Appellants were

accorded in the Texas courts. Even more conclusive of approval of the Texas procedure is *Pacific Livestock Company v. Lewis*, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084 (1916). The statute there in question dealt with administrative control of water rights. Federal questions were raised on the basis of the statute's permitting the agency to base its ruling both upon ex parte affidavits of claimants and upon the report of its own engineer. In holding that there was no violation of due process, this court noted that the agency order was subject to judicial review, that the trial court in such review proceedings was authorized to take "further evidence" and to "re-examine the whole matter," and that an appeal from the trial court's decree could be taken to the Supreme Court of the State. In response to the Appellants' contentions of violations of the Fourteenth Amendment on the basis of the ex parte affidavits and the use of the administrative officer's report, this Court ruled:

> ". . . while it is true, according to the concessions at the bar, that the sworn statements of claims are taken ex parte in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them, and that, upon the hearing of the contests, full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken ex parte becomes of no moment. And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office . . . Considering the nature of the report, and that claimants may oppose

it with other evidence, it is plain that its use as evidence is not violative of due process."[4]

Appellants in the case at bar have had an equal opportunity to contest the application of American Savings & Loan and to oppose the report of the investigator for the Banking Commissioner.

That judicial review of administrative orders in Texas may in some aspects differ from that in other jurisdictions does not even indicate a deprivation of constitutional rights. "The Federal Constitution does not prevent the states from determining on due notice an opportunity to be heard by what process legal rights may be asserted or legal obligations enforced." *Gelfert v. National City Bank of New York*, 313 U.S. 221, 235, 61 S.Ct. 898, 85 L.Ed. 1299 (1941).

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[4] Among other holdings in point see **St. Joseph's Stock Yards Company v. United States**, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936); **New Hampshire Fire Insurance Company v. Murray**, 107 F.2d 212 (7th Cir., 1939); and **Victor v. Porter**, 157 F.2d 769 (Em.Ct., 1946), certiorari denied 329 U.S. 801, 67 S.Ct. 491, 91 L.Ed. 684 (1947).

[5] Appellants' contention that the substantial evidence rule places "an impossible burden" upon those seeking to set aside an administrative order is provably without merit. The article, "The Trial of Administrative Appeals," in 26 Texas Bar Journal 731, 793-794 (September 22, 1963), specifically refutes the quoted statement: ". . . it is not impossible; compare the two Gibraltar Savings Association cases at 348 S.W.2d 467 and 348 S.W.2d 472 (both Aus.Civ.App., 1961, writ ref'd n.r.e.), where the court on the one hand found that there was substantial evidence to support the Banking Commissioner's denial of Gibraltar's downtown Houston branch, but on the other hand found that there was no substantial evidence to support the Commissioner's denial of Gibraltar's Northshore Houston branch. In a third Gibraltar Savings Association case, decided July 24, 1963, 6 S.Ct. J. 622, the Supreme Court reversed the Austin Court of Civil Appeals, and held that there was no substantial evidence to support the Commissioner's denial of Gibraltar's Smith-Hofheinz Houston branch.

"During the period from September 1961, through December 1962, a total of 134 appeals from administrative orders were filed in the three district courts of Travis County. During this same period of time, judgment was rendered in thirteen cases. Of these thirteen cases which were tried, the state agency's order was overruled in seven and upheld in six."

"The State is entitled to determine the procedure of its courts so long as it provides the requisite due process." *United Gas Public Service Co. v. State of Texas*, 303 U.S. 123, 140, 58 S.Ct. 483, 82 L.Ed. 702 (1938).

In a per curiam opinion dismissing appeal, this Court in *Martin v. Walton*, 368 U.S. 25, 82 S.Ct. 1, 7 L.Ed.2d 5 (1961), said (368 U.S. 25-26):

> "The appeal is dismissed for want of a substantial federal question. Upon plenary consideration, we are satisfied that, both on their face and as applied to appellants, Kan.Gen.Stat., 1949, sec. 7-104, and amended Kans. Sup. Ct. Rules 41 and 54 promulgated by the Supreme Court of Kansas, acting within its competence under state law, are not beyond the allowable range of state action under the Fourteenth Amendment . . . We cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question. 187 Kan. 473, 357."

Appellees submit that the same ruling is equally applicable to the case at bar.

(b) The statute upon which the complaint is based has been repealed.

Completely independent of the considerations discussed above, the additional fact that the statute here in question has been repealed and that the new savings and loan act providing different procedures has been adopted conclusively establishes that the instant appeal fails to present any substantial federal question.[6]

A comparable situation was before this court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), where this Court in dis-

[6] The pertinent portions of the new act are reproduced in the Appendix.

missing writ of certiorari as improvidently granted said (349 U.S. 73):

> "In our consideration of this petition our attention has now been focused upon an Iowa statute enacted since the commencement of this litigation. Though it was in existence at the time the case first came here, it was then not seen in proper focus because blanketed by the issues of 'state action' and constitutional power for which our interest was enlisted. This Iowa statute bars the ultimate question presented in this case from again arising in that State."

Appellants here concede (Jurisdictional Statement, pages 33 and 34) that the new Texas Savings & Loan Act will prevent recurrence of the matters of which they complain and that this appeal is brought solely for the benefit of the appellants themselves. They have, therefore, in effect admitted that this case does not merit consideration by the Supreme Court of the United States.

In the *Rice* case, this Court further explained:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

The same rule was recently applied in *Rudolph v. United States*, 370 U.S. 269, 82 S.Ct. 1277, 8 L.Ed.2d 484 (1962), and is directly in point in the case at bar.

IN PART THE FEDERAL QUESTIONS SOUGHT TO BE RAISED WERE NEITHER TIMELY NOR PROPERLY RAISED

Insofar as Appellants seek to attack the application of the substantial evidence rule to judicial review of the

Banking Commissioner's order approving the application of American Savings & Loan Association, the question was not timely raised. Appellees do not concede, but instead expressly deny, that a substantial federal question could exist in this regard. Even, however, if there were any merit in the contentions, Appellants are foreclosed from presenting such question.

It will be recalled that the State of Texas initially took the position that an order of the Banking Commissioner approving a savings and loan application was not appealable. Appellants, urging the same federal questions of due process and equal protection, secured from the Supreme Court of the State of Texas a decision, *Brazosport Savings & Loan Association, et al v. American Savings & Loan Association, et al*, 161 Tex. 543, 342 S.W.2d 747 (1961), granting them "an opportunity to prove their allegations that the Commissioner's action was illegal or without support in substantial evidence."

Appellants, as petitioners in the Supreme Court of Texas had, in effect, sought judicial review under the substantial evidence rule. Moreover, after the Supreme Court of Texas unequivocally directed that judicial review be under the substantial evidence rule, Appellants made no protest with regard to that directive. No motion for rehearing whatsoever was filed by either party.

It is elementary that a constitutional question must be raised at the earliest opportunity or it will be considered as waived. 16 C.J.S. 340, Constitutional Law, §96. In *Pierce Oil Corporation v. Phoenix Refining Company*, 259 U.S. 125, 128-129, 42 S.Ct. 440, 66 L.Ed. 855 (1922), this Court noted:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. Pierce v. Somerset Railway Co., 171 U.S. 641, 658, 19 Sup. Ct. 64, 43 L.Ed. 316; Wall et al. v. Parrot Silver & Copper Mining Co., 244 U.S. 407, 411, 37 Sup.Ct. 609, 61 L.Ed. 1229."

Indisputably Appellants had an opportunity to seek modification of that decision. Having failed to do so they have no basis for a complaint that the decision was unconstitutional. *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 701, 43 S.Ct. 694, 67 L.Ed. 1194 (1923). Even in criminal cases a constitutional right may be forfeited by failure to make timely assertion of the right. *Michel v. State of Louisiana*, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955), rehearing denied 350 U.S. 955, 76 S.Ct. 340, 100 L.Ed. 831 (1955); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Hawk v. Olson*, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61 (1945).

Of further significance is the fact that an administrative order, subject to review under the substantial evidence rule, was before the Supreme Court of Texas in *Board of Water Engineers v. Colorado River Municipal Water District*, 152 Tex. 77, 254 S.W.2d 369 (1953). In describing the rule, which is precisely as it was applied in the case at bar, the court there said:

> "Under the rule the court makes an independent determination from the evidence adduced at the trial of whether the administrative order is reasonably supported by substantial evidence. The statute provides that the court shall determine the reasonableness of the order. If an order is reasonably supported by

> substantial evidence it is reasonable; otherwise it is unreasonable."

This court's denial of certiorari, 346 U.S. 815, 74 S.Ct. 25, 98 L.Ed. 342 (1954), is indicative of the fact that the question which Appellants here seek to raise has previously been before this Court and found to be without merit.

THE JUDGMENT CAN BE SUSTAINED UPON AN INDEPENDENT STATE GROUND

The only matter involved in this litigation is the Banking Commissioner's approval of the charter application of American Savings & Loan Association. Completely independent of the federal questions which Appellants raised in that court and seek to raise in this court, the Supreme Court of Texas held that the Banking Commissioner's order was supported by substantial evidence. The then applicable statute, Article 881a-2, Vernon's Annotated Civil Statutes, specifically provided for the issues to be determined in such situations. The same topics for consideration were substantially repeated in Rule 2.1 (Plaintiffs' Exhibit 6-b).

Upon the basis of the evidence submitted to the trial court, the Supreme Court of Texas ruled that the order was reasonably supported by substantial evidence and was not arbitrary. The testimony sustaining that conclusion is summarized in the Court's opinion from which this appeal is taken and is abundantly substantiated by the record here before this Court. Completely independent of any federal issue, that ruling sustains the judgment here attacked. In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 683 (1936), Mr. Justice Brandeis in his concurring opinion (297 U.S. 288, 347), in speaking of this Court's jurisdiction, pointed out that:

> "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191, 29 S.Ct. 451, 53 L.Ed. 753; Light v. United States, 220 U.S. 523, 538, 31 S.Ct. 485, 55 L.Ed. 570. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. Berea College v. Kentucky, 211 U.S. 45, 53, 29 S.Ct. 33, 53 L.Ed. 81."

Although Appellees do not concede but instead expressly deny that any substantial federal question has been raised in the instant case, the above noted, consistently followed rule would alone and in itself provide abundant ground for Appellees' present motion to dismiss. Appellants were unsuccessful in their effort to secure from the courts of the State of Texas findings of fact contrary to those made by the Banking Commissioner. By their appeal to this Court, Appellants, in essence and effect, seek only to relitigate those factual questions. To grant them such a second opportunity would be contrary to this Court's holding in *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 348-349, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), where it was held that:

> "And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that con-

stitutional rights are involved. State of New York v. United States, 1947, 331 U.S. 284, 334-36, 67 S.Ct. 1207, 1233, 1234, 91 L.Ed. 1492; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 1941, 311 U.S. 570, 576, 61 S.Ct. 343, 346, 85 L.Ed. 358."

CONCLUSION

The judgment of the Supreme Court of Texas is adequately supported by independent state grounds. The Appellants have presented no substantial federal question; they not only seek to attack the very statute upon which they rely for their own existence, but they also concede that that statute has been repealed and that the matters of which they complain could not again arise. The appeal does not merit this court's consideration.

Respectfully submitted,

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PROOF OF SERVICE

I, HOWARD W. MAYS, one of the attorneys for J. M. FALKNER, Banking Commissioner of Texas, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of December, 1963, I served copies of the foregoing Motion to Dismiss this appeal or, alternatively, to affirm the judgment of the Supreme Court of the State of Texas, including the Appendix attached to such Motion, on the several parties who are Appellants herein, in compliance with Paragraph 1 of Rule 33 of the Rules of this Court, by depositing copies in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants as follows: John J. McKay, 703 Perry-Brooks Building, Austin, Texas; R. W. Lindsey, Rosenburg, Texas; and Peareson, Sherer & Roberts, Richmond, Texas.

HOWARD W. MAYS
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APPENDIX

Article 881a-2, Vernon's Annotated Civil Statutes of the State of Texas (Acts 1929, 41st Leg., 2nd C. S., p. 100, ch. 61, § 2).

When any persons shall file a proposed charter or articles of agreement as is elsewhere herein provided, if it appears to the satisfaction of the Banking Commissioner of Texas that the minimum capital required has been paid in cash into the treasury of the association upon subscriptions for shares, the Banking Commissioner of Texas shall ascertain from the best sources at his command, and by such investigation as he may deem necessary, the expense of such investigation to be paid by the incorporators, whether the character, responsibility and general fitness of the persons named in the articles of incorporation are such as to command confidence and warrant belief that the business of the proposed building and loan association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act, and whether the public convenience and advantage will be promoted by allowing such proposed building and loan association to be incorporated and engaged in business, and whether the population in the neighborhood of such place and in the surrounding country affords a reasonable promise of adequate support for the proposed building and loan association. If it shall be satisfied concerning the several matters specified, the Banking Commissioner of Texas shall issue under his official seal a certificate reciting in substance the filing in its office of the articles of incorporation; that such articles conform to all requirements of the law, and that they have been approved. whereupon the persons named in the articles of association, their associates and successors, shall become

a corporate body for the period for which they were organized, and shall exercise such powers as are herein granted, and such other powers as are necessary to enable such association to carry out the purpose of its organization, not inconsistent with the provisions of this Act, but before such association shall proceed to do business it shall adopt and have approved by the Banking Commissioner of Texas by-laws for the regulation and management of its business, not inconsistent with the provisions herein provided. Acts 1929, 41st Leg., 2nd C. S., p. 100, ch. 61 § 2.

Repealed Acts 1963, Vernon's Texas Session Law Service, Ch. 113, pp. 269-301.

Vernon's Texas Session Law Service,
Acts 1963, 58th Leg., Ch. 113, pp. 269-301

"SAVINGS AND LOAN ACT

. . . .Section 1.01. This Act shall be known and may be cited as the 'Texas Savings and Loan Act.'

. . . . CHAPTER TWO. FORMATION OF ASSOCIATIONS

APPLICATION FOR CHARTER

Section 2.01. Application for a charter for a savings and loan association may be made by five (5) or more citizens of this State (hereinafter referred to as incorporators) by tendering to the Commissioner along with the proper filing fee, an application consisting of the following:

(1) Two (2) copies of Articles of incorporation for the proposed association stating (i) the name of the association, (ii) the site of the principal office and (iii) the names and addresses of the initial directors.

(2) A statement as to (i) the amount, if any, of Permanent Reserve Fund Stock which has been subscribed and paid for at the time of filing, (ii) the names and addresses of such subscribers and the amount subscribed by each, (iii) the amount of savings liability, if any, with which the association will commence business, (iv) the amount of paid-in surplus or expense fund with which the association will commence business.

(3) Two (2) copies of the bylaws under which the association proposes to operate.

(4) Statements, exhibits, maps and other data sufficiently detailed and comprehensive as to enable the Commissioner

to pass upon the matters set forth in Section 2.08(2), (3) and (4) of this Act and such other information in regard to the proposed association and its operation as may be required by duly promulgated rules and regulations of the Commissioner and the Building and Loan Section of the Finance Commission of Texas.

The Articles of incorporation and all statements of fact tendered to the Commissioner in connection with an application for charter shall be subscribed and sworn to under the sanction of an oath, or such affirmation as is by law equivalent to an oath, made before an officer authorized to administer oaths.

Permanent Reserve Fund Stock

Sec. 2.02. The charter of an association may provide for the issuance of Permanent Reserve Fund Stock. No other form or type of stock or shares shall be issued. Such Permanent Reserve Fund Stock, when issued, may not be retired or withdrawn except as hereinafter provided, until after all liabilities of the association shall have been satisfied in full, including the withdrawal value of all savings accounts. Such stock must be fully paid for in cash in advance of issuance and the association may not make any loans against the shares of such stock. Shares of such stock may have a par value of not less than One Dollar ($1) nor more than One Hundred Dollars ($100) each. An association authorized to issue such stock must have at all times issued and outstanding an amount thereof equal in par value to Twenty-five Thousand Dollars ($25,000) or two and one half per cent (2½%) of its gross assets whichever is greater but no association shall be required to have more than Two Hundred and Fifty Thousand

Dollars ($250,000) of the par value of such stock outstanding. Associations whose savings accounts are insured by the Federal Savings and Loan Insurance Corporation may retire in whole or in part any such stock heretofore issued when such associations are authorized to do so by a majority vote at any annual meeting of its members, or any special meeting of members called for such purpose; provided, that the basis of such retirement shall have been first approved by the Commissioner and consent to such retirement upon the part of the Federal Savings and Loan Insurance Corporation has been filed in writing with the Commissioner.

Stock requirements for proposed Permanent Reserve Fund stock associations

Sec. 2.03. Incorporators of proposed associations with authority to issue Permanent Reserve Fund Stock, as a prerequisite to the approval of an application for a charter shall be required to have subscribed and paid for in cash to the credit of the proposed association an aggregate amount of Permanent Reserve Fund Stock as the Commissioner shall specify within the limits set for such stock in the preceding Section. Such stock shall be issued within thirty (30) days from the date of incorporation.

Paid-in surplus requirements for Permanent Reserve Fund Stock associations

Sec. 2.04. As a prerequisite to approval of any application for a proposed association with authority to issue Permanent Reserve Fund Stock the Commissioner may require in addition to the amount paid in for such stock a paid-in surplus up to but not in excess of the aggregate amount

of the Permanent Reserve Fund Stock required under the preceding Section. Such paid-in surplus may be used in lieu of earnings to pay organization and operating expenses, dividends on savings accounts and to meet any loss reserve requirements. If the application should not be approved or if the proposed association does not proceed to do business, the stock subscriptions for Permanent Reserve Fund Stock and paid-in surplus shall be returned pro rata to the subscribers, less any lawful expenditures.

Savings account requirements for proposed associations without Permanent Reserve Fund Stock

Sec. 2.05. As a prerequisite to the approval of an application for a charter of an association without Permanent Reserve Fund Stock the incorporators must show to the satisfaction of the Commissioner subscribed and paid-in savings accounts in the following aggregate amounts in relation to the population of the community in which the home office of the association is to be located: (a) in communities having not more than ten thousand (10,000) inhabitants, the minimum sum of Fifty Thousand Dollars ($50,000); (b) in communities having more than ten thousand (10,000) but less than one hundred thousand (100,000) inhabitants, the minimum sum of One Hundred Thousand Dollars ($100,000); (c) in communities having one hundred thousand or more inhabitants, the minimum sum of Two Hundred Thousand Dollars ($200,000); provided, that the Commissioner may, in his discretion, require a larger amount to be paid in. The population of the community shall be determined by the Commissioner based upon the latest Federal census.

Expense fund requirements for proposed association without Permanent Reserve Fund Stock

Sec. 2.06. In addition to the savings account subscriptions required by the preceding Section the incorporators of an association without Permanent Reserve Fund Stock must show to the satisfaction of the Commissioner that an expense fund has been subscribed and paid into the credit of the proposed association equal to not less than fifty per cent (50%) of the minimum specified amount of required savings accounts set out in Section 2.05, from which expense fund the expense of organizing the association and its operating expenses in addition to such dividends as may be declared and paid or credited to its savings account holders may be paid until such time as its earnings are sufficient to pay same. The amounts so contributed to the expense fund shall not constitute a liability of the association except as hereinafter provided. Such contributions may be repaid pro-rata to the contributors from the net earnings of the association after provision for required loss reserve allocations and payment or credit of dividends declared on savings accounts. In case of the liquidation of an association before contributions to the expense fund have been repaid, any contributions to the expense fund remaining unexpended, after the payment of expenses of liquidation, all creditors, and the withdrawal value of all savings accounts shall be paid to the contributors pro-rata. The books of the association shall reflect such expense fund. Contributors to the expense fund shall be paid dividends on the amounts paid in by them and for such purpose such contributions shall in all respects be considered as savings accounts of the association.

Hearings on charter applications

Sec. 2.07. When a proper application for a charter has been filed, the Commissioner shall cause public notice of such application to be given and give any interested party an opportunity to appear, present evidence and be heard for or against such application.

Approval of application for charter

Sec. 2.08. The Commissioner shall not approve any charter application unless he shall have affirmatively found from the data furnished with the application, the evidence adduced at such hearing and his official records that:

(1) the prerequisites, where applicable, set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 have been complied with and that the Articles of incorporation comply with all other provisions of this Act;

(2) the character, responsibility and general fitness of the persons named in the Articles of incorporation are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this Act and that the proposed association will have qualified full-time management;

(3) there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation;

(4) the operation of the proposed association will not unduly harm any existing association.

If the Commissioner so finds, he shall state his findings in writing and issue under his official seal a certificate of incorporation and deliver a copy of the approved Articles of incorporation and bylaws to the incorporators and retain a copy thereof as a permanent file of his office, whereupon the proposed association shall be a corporate body with perpetual existence unless terminated by law and may exercise the powers of a savings and loan association as herein set forth.

Refusal of charter application

Sec. 2.09. If the Commissioner is unable to make the findings as required by the preceding Section, he shall endorse upon each copy of the proposed Articles of incorporation the word 'refused' with the date of such endorsement and attach thereto a written statement of his grounds for such refusal. One copy of the proposed Articles and attached grounds of refusal shall be promptly mailed to the incorporators by certified mail.

Forfeiture of charter for failure to commence business

Sec. 2.10. Any association whose charter has been approved under this Act shall commence business within six (6) months after the date of such approval. If an association has not commenced business within such time, the incorporators may request a hearing before the Commissioner; and if good cause is shown for such failure, the Commissioner may grant a reasonable extension of the time for commencing business to give such association an opportunity to overcome the cause for the delay in commencing business. Failure to commence business as herein

required shall constitute grounds for forfeiture of the association's charter at the suit of the Attorney General upon request of the Commissioner brought in the County where the association proposes to locate its principal office.

Amendment of charter and bylaws

Sec. 2.11. Any association may, by resolution adopted by a majority vote of its members at any annual meeting or any special meeting called for such purpose, amend its charter or bylaws in any manner not inconsistent with the provisions of this Act; provided, that before such amendments become effective they must be filed with and approved by the Commissioner.

Corporate name; exclusive use by Associations

Sec. 2.12. The name of every association shall include either the words 'Savings Association,' or 'Savings and Loan Association.' These words shall be preceded by an appropriate descriptive word or words approved by the Commissioner. An ordinal number may not be used as a single descriptive word preceding the words 'Savings Association.' or 'Savings and Loan Association,' unless such words are followed by the name of the town, city or county in which the association has its home office. No certificate of incorporation of a proposed association having the same name as any other association authorized to do business in this State under this Act or a name so nearly resembling it as to be calculated to deceive shall be issued by the Commissioner, except to an association formed by the reincorporation, reorganization, or consolidation of other associations, or upon the sale of the property or

franchise of an association. No person, firm, company, association, fiduciary, partnership or corporation, either domestic or foreign, unless authorized to do business in this State under the provisions of this Act shall do business under any name or title which indicates or reasonably implies that the business is the character or kind of business carried on or transacted by an association or which is calculated to lead any person to believe that the business is that of an association. Upon application by the Commissioner or any association, a court of competent jurisdiction may issue an injunction to restrain any such entity from violating or continuing to violate any of the foregoing provisions of this Section.

Change of office or name

Sec. 2.13. No association shall, without the prior approval of the Commissioner (i) establish any office other than the principal office stated in its articles of incorporation, (ii) move any office of the association from its immediate vicinity or (iii) change its name. When his approval is applied for, the Commissioner shall give any person who might be affected an opportunity to be heard on the action proposed to be taken for which approval is sought.

Preference to local control

Sec. 2.14. In any instance where there is a conflict between an application for the approval of a charter for a new association and an application for the establishment of an additional office by an existing association both seeking to locate in the same community and the principal office of the existing association is located in a different

county than such community, the Commissioner may give additional weight to the application having the greater degree of control vested in or held by residents of the particular community.

* * *

Judicial review

Sec. 11.12. Any party with an interest in the subject matter thereof who is dissatisfied with any act, order, ruling or decision of the Commissioner taken or made, or with any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission in connection with the administration of this Act, may secure judicial review thereof in the following manner:

(1) Venue.

(a) Proceedings for review of a removal order entered pursuant to Section 8.14 of this Act, may be instituted by filing a petition as in civil actions generally against the Commissioner, as defendant, either in a district court of Travis County, or in the district court of the county in which any person affected by such order resides or of the county in which the principal office of the association affected by such order is located.

(b) Proceedings for review of other acts, orders, rulings or decisions of the Commissioner or of any rule or regulation promulgated by the Commissioner and the Building and Loan Section of the Finance Commission may be instituted by filing a petition as in a civil action generally against the Commissioner, as defendant, in a district court of Travis County and not elsewhere.

(2) Time for Filing. Any petition for judicial review must be filed within thirty (30) days after the action, order, ruling or decision of the Commissioner is final or the rule or regulation complained of is promulgated.

(3) Stay of Enforcement. The filing of a petition for review shall not itself stay the effect of the act, order, ruling, decision or rule or regulation complained of, but the Commissioner or the reviewing court may order a stay upon appropriate terms and if a stay is so granted no supersedeas bond shall be required.

(4) Service of Process. The petition for review shall be served on the Commissioner and upon all parties of record in any hearing before the Commissioner in respect to the matter for which review is sought or upon the Commissioner alone if the matter for which review is sought is a rule or regulation promulgated in connection with the administration of this Act. After service of such petition upon the Commissioner and within the time permitted for filing an answer, the Commissioner shall certify to the District Court in which such petition is filed the record of the proceedings to which the petition refers. The cost of preparing and certifying such record shall be paid to the Commissioner by the petitioner and taxed as part of the cost in the case, to be paid as directed by the court upon final determination of said cause.

(5) Trial.

(a) The review of an order issued under Section 8.14 of this Act shall be tried in the same manner as civil actions generally and the complaining party shall be entitled to a jury. The trial shall be governed by the rules of civil

procedure and all fact issues material to the validity of such order shall be determined de novo on the preponderance of the evidence and the substantial evidence rule shall not apply. Any relevant and competent evidence shall be admissible for or against the order.

(b) The review of any other act, order, ruling or decision of the Commissioner or of any rule or regulation shall be tried by the court without a jury in the same manner as civil actions generally and all fact issues material to the validity of the Act, order, ruling, decision or rule or regulation complained of shall be redetermined in such trial on the preponderance of the competent evidence, but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing.

(6) Burden of Proof and Judgment. The burden of porof shall be on the plaintiff. The reviewing court may affirm the action complained of or remand the matter to the Commissioner for further proceedings.

(7) Appeals. Appeals from any final judgment may be taken by either party in the manner provided for in civil actions generally, but no appeal bond shall be required of the Commissioner.

* * *

Sec. 2. Repeal of Conflicting Laws.

(a) In connection with the general purpose of this Act the following Statutes and Acts, together with all laws or parts of laws in conflict herewith, are hereby repealed:

(1) Articles 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871,

872, 873, 874, 875, 876, 877, 878, 879, 880, 881 of Title 24, Revised Civil Statutes of Texas; Articles 1134, 1135, 1136, Penal Code of Texas, and all amendments to said Articles.

(2) Acts 1929, Forty-first Legislature, Second Called Session, page 100, Chapter 61, as amended Acts 1930, Forty-first Legislature, Fifth Called Session, page 193, Chapter 51; Acts 1931, Forty-second Legislature, page 53, Chapter 36; Acts 1931, Forty-second Legislature, page 320, Chapter 191; Acts 1931, Forty-second Legislature, page 331, Chapter 198; Acts 1932, Forty-second Legislature, Third Called Session, page 34, Chapter 18; Acts 1932, Forty-second Legislature, Third Called Session, page 32, Chapter 17; Acts 1935, Forty-fourth Legislature, page 159, Chapter 68; Acts 1939, Forty-sixth Legislature, Title: Building and Loan Associations, page 74, Chapter 1, page 76, Chapter 2, page 87, Chapter 3; Acts 1941, Forty-seventh Legislature, page 346, Chapter 188; Acts 1943, Forty-eighth Legislature, page 482, Chapter 323; Acts 1945, Forty-ninth Legislature, page 28, Chapter 18; Acts 1947, Fiftieth Legislature, page 348, Chapter 196; Acts 1947, Fiftieth Legislature, page 488, Chapter 285; Acts 1949, Fifty-first Legislature, page 486, Chapter 263; Acts 1949, Fifty-first Legislature, page 696, Chapter 363; Acts 1949, Fifty-first Legislature, page 966, Chapter 534; Acts 1951, Fifty-second Legislature, page 204, Chapter 119; Acts 1951, Fifty-second Legislature, page 233, Chapter 139; Acts 1953, Fifty-third Legislature, page 1028, Chapter 425; Acts 1957, Fifty-fifth Legislature, page 1319, Chapter 445 (Article 881a, Subdivision 1-69, Vernon's Civil Statutes of Texas).

(3) Acts 1949, Fifty-first Legislature, page 601, Chapter 319 (Article 811b, Vernon's Civil Statutes of Texas)."